The Constitutional System of Jammu and Kashmir

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PREFACE

The book "the constitutional system of Jammu and Kashmir," as the title indicates, examines the constitution Jammu &Kashmir. It is updated version of my earlier publication of the book 'Jammu and Kashmir constitution'. It discusses the emergence of the constituent assembly of the State and the necessity of drafting a constitution of the State. The State of Jammu and Kashmir enjoys a special status within the Indian constitutional framework. Consequently, the constitution in its entirety is examined and discussed. Though there could be no scope to project personal views, yet an attempt has been made to this end upto some extent. My personal views cannot be the final word but can help evaluate the constitution in a proper perspective.

Peace to my mother, who is still a source of inspiration for me, and had the good wishes of my father, late Abdul Qadeer Fazili Gamroo, Bandipore not been with me, this work would not have been accomplished.

However, with gratitude is acknowledged the assistance of my son, Ehasan Fazili, whom the book was dictated and who showed the patience of his grand-father to receive it.

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CHAPTER I

CONSTITUTIONAL DEVELOPMENT

Before the partition of India, the State of J& K was ruled and Governed by the Maharaja of Jammu and Kashmir. He was the last Dogra ruler who ascended the throne in September 1925. The Dogras had taken over J&K under the treaty of Amritsar in 1846. In 1931, there was a political upsurge; as a result the Maharaja initiated some constitutional reforms. Many reforms were recommended by various commissions from time to time after July 1931. A constitutional reforms commission started its work in March 1932 and submitted its report the same Year. The commission recommended the establishment of a legislative assembly as soon as possible and made suggestions regarding its composition, powers and functions.'

In May 1932, a Franchise Commission was appointed under the chairmanship of Sir Barjor Dalal. An Englishmen, Sir Iro Elliot Bart was appointed Franchise officer in 1933. In Februrary 1934, His Highness accepted the recommendations of the commission. The inauguration of the Praja Sabha by His Highness Maharaja Hari Singh on October 17th, 1934, accomplished the task of the reform commission and the Franchise Commission. However, the ultimate powers re-

mained with the Maharaja yet on Feburary 11, 1939, His Highness was pleased to announce another instalment of the constitutional reforms, which extended the powers of the Praja Sabha.

The J&K constitution Act (NO IV of 1996) was enforced with effect from Thursday, the 7th September 1939, under the directions of His Highness. According to the proclamation the text of the constitution contained in regulation I of 1991 had been overhauled. The new text was brought into line with that of similar constitutions of that type at the time. A separate part (part IV) under the J&K constitution Act (of 1996 XIV) was dedicated to the judicature of the State. It dealt with the powers of the High Court of judicature, establishment and the functioning of the Board of Judicial Advisers. The constitution Act of 1996, in addition to the part dealing with judiciary, visualized, the executive as well as the State legislature. The preamble of the constitution provided definitions of 'council', 'Gazette', 'His highness', "official and non- official", Rules, State and the 'government'. In addition; it declared all powers, whether, legislative, executive or judicial in relation to the State, to be inherent in and possessed and retained by His Highness Maharaja Hari Singh.

These constitutional reforms, enforced from time to time, governed the State of J&K from 1932 to 1947. The Maharaja governed the State during this period with the help of a council of Ministers presided over b y the prime minister. A legislative assembly known as the Praja Sabha was to advise on legislative matters. It had elected nominated and official members. For the proper administration of law and justice there was a High Court of judicature. There was a Board of Judicial Advisors to help His Highness with advice in appeal cases. Whether a bill was to be introduced by the Prime Minister or any minister or by a private member it was subject to the rules of procedure and it could not become law

without the assent of His Highness. Except the case of reserved subjects, members of the Praja Sabha were entitled to discuss activities of any department.

For purposes of civil administration the State was divided into three major divisions:-

1. The Province of Jammu.
2. The Province of Kashmir.
3. The Frontier District of Ladakh.

Upon the transfer on lease of the Trans-Indus area the Government of India, the Cis-Indus area comprising tehsil Buruji, which was formally included in the Gilgit district was annexed to the Ladakh district during 1935-36. Later, Ladakh was included in the province of Kashmir. The Revenue Commissioner was the head of the revenue administration and each of the two provinces was placed under the charge of a collector, called Governor. The Frontier district was placed under a Wazir. Each province was divided into districts, called Wazarats and each district was decided into several Tehsils. Each Tehsil was sub-divided into Niabats, under a Tehsildar. Under scheme after 1947, the three provinces of the State, Kashmir valley, Jammu and Ladakh continued to be with India after Maharaja's accession with certain changes in their administrative units. Kashmir valley and Jammu Has a divisional commissioner and each district is headed by a Development or Deputy Commissioner, whereas the Tehsil and Niabats continue as before. Ladakh has a separate Development Commissioner which heads the administration.

The first people's upsurge took place in July 1931. Many causes were responsible for it. Inflation in Europe and elsewhere had told upon the already instable economic condition of the people in the State. The land tenure system had reduced the ninety-five percent of the population to an abject poverty. Exploitation by money lenders, numberdars,

and zaildars added to the woes of the people. The workers, peasants and others were ruthlessly suppressed on account of misgovernment. The despotic rule of the Maharaja did not work for the welfare of the people. The government and the people had no meeting ground. The State was very backward in the field of education. In 1931, literacy in the State had risen to 41 per thousand, according to government version. In the valley of Kashmir, however, the literacy was assessed at 35 per thousand. Further, all types of freedoms were absent in the State. Some writers attribute the upsurge in July 1931, to the British maneuvers as they had felt that Kashmir's annexation to Indian empire for its strategic importance was necessary.

Prior to 13th July 1931, the Maharaja's reception on his arrival to the valley from outside created a controversy between Kashmiri Pandits and Muslims in Srinagar. Added were some posters alleging defilement of the Holy Quran by a Hindu policeman Labha Ram in Jammu. The posters provided enough provocation to the people to rebel. A meeting was held at Khanqahi-Maula to protest against the defilement. At the end of the meeting one Mr. Abdul Qadeer delivered an inflammatory speech and a criminal case was instituted by the government against him. On 13th July 1931, people in large numbers assembled outside the Srinagar Central Jail where the hearing of the case was to take place. The police firing on these people resulted in the death of more than seventeen persons.

Sheikh Mohammad Abdullah at this political stage emerged as a leader. He and his colleagues were jailed immediately after the 13th July firings. The Maharaja at this stage tried to settle issues with the leadership of the Muslim Conference but failed. Kashmir Day was celebrated on 14th August 1931. A complete hartal was observed in the State and at the call of the All India Kashmir Committee, the Day was also observed in almost all the big cities of India. During

September, the people of Kashmir demonstrated against the despotic ruler in Srinagar with crude weapons (Narchu) in their hands. This Narcho demonstration was an eye opener for the Maharaja. This movement against the Maharaja, thenceforth was an organized one. Its first meeting was held in Srinagar under the presidency of Sheikh Mohammad Abdullah in 1933, on the platform of the All J&K Muslim Conference.

Soon the Muslim conference Leadership invited non-Muslims to participate in a movement which was directed against the Maharaja. After dialogues between the leaders of various sections, particularly Kashmiri Pandits, the leadership agreed to grant this political organization a wider dimension. As a result, the All J & K Muslim Conference was declared a secular political party by converting it to All J & K National Conference in 1939. The Constitution of All J& K Muslim Conference was amended. There were series of Conference meetings and finally the amended Constitution was adopted at a special Conference on 11th June, 1939.

Thus the struggle for freedom in Kashmir, in the most pronounced form, was initiated in 1931 under the leadership of Sheikh Mohammad Abdullah. Later since 1939 the movement continued under the organization of All J&K National Conference, uptill 1947, when the Maharaja acceded to India on 26th October 1947. The struggle for freedom became continuous struggle of the masses of J&K under the "Halwala' banner of the National Conference. The Maharaja tried to appease the leadership and the people of J&K through constitutional reforms but failed. A programme was presented to the government namely "Naya Kashmir" on the invitation of the Maharaja, but the government failed to implement it. The document of "Naya Kashmir" is in fact the manifesto for establishing a welfare State. It is socialist in essence and content. It can safely be divided into three structural sections. The first deals with the constitutional

framework for the future of Kashmir. The second relates to a programme of economic including industrial and agricultural planning. The third part treats the socio- educational schemes for the future of J&K State.

The Maharaja failed to honour "Naya Kashmir" programme because he visualized in it danger to his despotic rule. The J&K National Conference, raised the slogan of the "Quit Kashmir", in 1946. The movement challenged the rule of the Maharaja. It questioned the legality of the treaty of Amritsar. The treaty of Amritsar is the sale deed under which J&K State was handed over in 1846, to the Dogra Maharaja Gulab Singh as a personal property. They demanded its revocation. The movement spread like wild fire and in every corner of the State people rebelled against the government and the princely ruler. There were mass arrests from every village, town and City. Hartals continued from many days the army and the police were given long rope to suppress the innocent Kashmiris. The tense situation continued for a long time and at the end Sheikh Mohammad Abdullah was tried for "treason". The Sheikh was sentenced to three years imprisonment on each of his so-called charges, and was to pay a fine of rupees five hundred. The leaders and workers continued to be under detention. In the meantime many changes took place on Indian political stage and even in the State things took different shape.

In 1947, the British labour government, granted independence to India, establishing two separate diminions, India and Pakistan. Before the dates of independence of India and Pakistan, the Congress leaders visited Kashmir and met the National Conference leaders in jails and the Maharaja Hari Singh in his palace. Nothing was, however, known at the time as to what passed between the Congress leaders and the National Conference leaders or the Maharaja. No doubt, guess work continued during the period. By the end of September 1947, however, the National Conference leaders were released. Sheikh Mohammad Abdullah was released on 29th September 1947 and subsequently his workers were also released. At the time there were other political parties in the State claiming to represent the people. Amongst important ones were, Kisan Mazdoor Conference, All J&K Muslim Conference, and Kashmir Socialist Party the Muslims and the Socialist Party in their resolutions advised the Maharaja to accede to Pakistan. The Kisan Mozdoor Conference after considering the issue at its working committee meeting said, "The working committee holds the view that the majority of the population desires to accede to Pakistan, and the welfare of the 39 lakhs of peasants and workers also lies in it." However, the National Conference under the leadership of Sheikh Mohammad Abdullah decided to support the accession to India on the plea that he and his party represented the majority. The Sheikh on this occasion said that the policies of the National Conference were progressive and that its ideology coincided with the Indian National Congress. The Maharaja, on the persuasion by Indian National Congress leaders, decided to accede to India. The accession was accepted by then Governor General of India and Indian troops moved into Kashmir to defend it against raiders from Pakistan. This accession, however, was termed by Mr. Mohd. Ali Jinnah as accession by "fraud and violence." As a result of conflict, parts of the State of J&K went under the control of Pakistan, which is named by them as "Azad Kashmir" and the rest of the State remained with India. The accession to India was limited to three subjects under the instrument of accession, and the position of the State in relation to Indian constitutional framework was to be determined under Article 370 of the Indian constitution. Balraj Puri asserts rightly that India succeeded in making a State like J&K as her part because of her armed strength and intelligent political calculations of Nehru, reasonableness of Mountbatten, dynamic leadership of Sheikh Mohammed Abdullah, ma-

turity of Kashmir people and above all high idealism of Gandhi besides the shortsightedness of Pakistan.

With accession, however, changes followed. The first two acts of the Maharaja after accession were significant. The Sheikh had already been released and the Maharaja in his letter to Mountbatten declared his intention to set up an interim government with Sheikh Mohammad Abdullah as its head. The interim administration or what was termed as emergency administration was set up on October 30, 1947. There was after the establishment of emergency administration in the State, a double government. One administration was headed by M. C. Mahajan as the regular government of the Maharaja and the other headed by Sheikh Mohammad Abdullah. Second act of the Maharaja was to end the government of M. C. Mahajan and concede a full-fledged popular government to the N. C. on March 5, 1948. The Maharaja, while ending his Prime Minister's government declared that the policy was aimed at setting up a full democratic constitution based on adult franchise. The administration was replaced by a popular interim government composed of a council of Ministers who were to function as a Cabinet, acting on the principle of joint responsibility. The Maharaja's proclamation said,

> "My Council of Ministers shall take appropriate steps, as soon as restoration of normal conditions has been completed, to convene a National Assembly based upon adult suffrage, having due regard to the principle that the number of representatives from each voting area should as far as practicable be proportionate to the population of that area.... The National Assembly shall, as soon as the work of framing the new Constitution is completed, submit it through the Council of Ministers for my acceptance."

On May 27, the Indian Constituent Assembly decided

to fill up the four seats allotted to Kashmir on the basis of nomination by the head of the State of India. The four Kashmiri representatives including Sheikh Abdullah took their seats in the Constituent Assembly on June 16, 1948.

On June 20, 1949, the Maharaja of Kashmir issued a proclamation announcing his decision to quit Kashmir on health ground. Leaving his throne to his son Yuvraj Karan Singh because he had to lose his powers with due regard to democratic system of government. By 26th January 1950, the Indian Constitution adopted by Indian Constituent Assembly, was enforced. Under the Indian constitutional system the J&K State was to be governed by Article 370 of the Constitution. The Article expressly provided that the law-making power of the union Parliament in regard to Kashmir would be specified by the President in consultation with the State Government. On January 26, 1950, the President of India accordingly promulgated the Constitution (Application to Jammu and Kashmir) order, 1950 specifying in two different schedules the powers of the Union and the applicability of the Constitution. The central subjects included Foreign Affairs, Defence and Communication. On April 20, 1951, the new ruler Yuvraj Karan Singh issued an order of holding elections for a constituent Assembly in the State immediately. The goal of convening constituent Assembly was to draft a constitution for the State of J&K. The Assembly was to be elected by direct secret ballot on the basis of adult suffrage. The delimitation of the constituencies was to be territorial. The elections to the State Constituent Assembly took place on October 15, 1951. To the surprise of all, the seventy-three seats were won by the candidates of the National Conference unopposed, out of seventy five seats of the Assembly. In two other constituencies, the National Conference candidates defeated independent candidates. The criticism against these elections came from two quarters. Firstly, from Praja Parishad Jammu, which stood for "full accession" of

the State to India and second from the Government of Pakistan. Praja Parshad boycotted the elections because it thought that the government of the Sheikh had brought undue pressure, resorted to illegal means and rejected all Parishad nominations. Pakistan's Central Minister Gurmani declared it as "fraud" and "farce."

However, the Kashmir Constituent Assembly first met on October 31, 1951, and completed its task of constitution making by Nov 17, 1956. During the periods between 1951-1956, the Assembly also functioned as a legislature of the State. This Assembly also elected members to the Indian Parliament of 1951, dealt with basic policy issues and determined other matters for the State of J&K. In the very beginning, the Assembly appointed committees on various subjects. It appointed Committees to draft the constitution, to decide compensation for acquiring land, fundamental rights, and citizenship. Basic principles Committee and other procedural committees were also appointed. In the records of the Constituent Assembly, the speech by Sheikh Mohammad Abdullah, is treated as most significant by Sisir Gupta and others. This speech asserted that the Assembly was the sovereign authority in the State. He called that day as the day of destiny and contended that whatever it decided had the irrevocable force of Law. He enumerated that the task of the Assembly was fourfold. He said that it had to draft a Constitution and to decide the future of the royal dynasty. He believed that the Assembly would deal with the problem of land-owner's demand for compensation and contended that it would decide the accession issue as reasonably as possible. With regard to the constitution Sheikh Abdullah desired that the Assembly be guided "by the highest principles of the democratic constitutions of the world." Referring to them and to the civilized nations he mentioned the principles of equality, liberty and social justice, rule of law, separation of powers and freedom of the individual as significant. Sheikh Abdullah said before the Constituent Assembly that there were three alternatives open to Kashmiris. The first he talked about the accession to India. The second alternative was accession to Pakistan and finally independent Kashmir he treated as one of the options. Though in his analysis he preferred accession to India as against the other two alternatives yet according to Inder Malhotra "the emphasis on Kashmir being an entity separate from both India and Pakistan wasunmistakable".

Sheikh Mohammad Abdullah's Statement of policy in the Constituent Assembly, was the guiding line for the Assembly in its functioning. The first problem decided by the Assembly was the demand of the landowners to pay compensation for their lands which were to be transferred to the tenants or the tillers. A committee was set up for this issue and when it reported in the second session of the Assembly it rejected the demand for compensation. It boldly reported, "what was robbed from them immorally and what is due to them morally, for that they are being asked to pay to those who got it without morality." The next item to deal with was the future of royal dynasty. On June 10, 1952, the second day of the third session of the J&K constituent Assembly, Sheikh Mohammad Abdullah presented the interim report of the basic Principles Committee which sought the Assembly's opinion on the issue of the status of the head of the State.

The report was discussed for three days in the Assembly on June 12, 1952 and the report was adopted. The Assembly directed the Drafting Committee to provide the provision for electing the head of the State. The third important item on which the Constituent Assembly expressed itself was the issue of accession to India. On August 11, 1952, the Sheikh made a Statement on what is known as Delhi Agreement. This inter alia provided the basis for the State's accession to India, as entered into between two Prime Ministers at the time Mr. Nehru of India and Mr. Sheikh Mohd Abdullah

Prime Minister of J&K. The agreement confined the scope and jurisdiction of the Union powers to the terms of the instrument of accession. Sheikh Mohammad Abdullah said at the time,

> "I would like to make it clear that my suggestions of altering arbitrarily the basis of our relationship with India would not only constitute a breach of the spirit and letter of the constitution, but it may invite serious consequences for a harmonious association of State with India."

The following were, however, the features of the Delhi Agreement of 1952:-

I. Residuary powers were vested in the State in the case of J&K State.

II. The residents of the State were to be treated as the citizens of India. It was further agreed that the State legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to acquisition of immovable property, appointments to services and like matters.

III. Fundamental rights were to be incorporated in the constitution of J&K but law regarding non-payment of compensation to landlords was to be protected.

IV. Supreme-court jurisdiction was recognized in regard to such fundamental rights as would be agreed to by the State, as also regarding disputes mentioned in article 131 of the constitution of India. Further consideration on the court was postponed for future.

V. The state flag of Halwala and the Indian National flag were to go together.

VI. Powers to grant reprieve and commute death sentences were to belong to the president of India.

VII. The following were the principles agreed upon to

determine the head of the State of J&K:-

a) the head of the State shall be the person recognized by the President of the Union on the recommendation of the legislature of the State.

b) he shall hold office during the pleasure of the President.

c) he may, by writing under his hand addressed to the President, resign his 0ffice.

d) he shall hold office for five years and

e) he shall continue to hold office till his successor was elected.

VIII. The necessity of some financial arrangement was felt but it was left for more details and future consideration.

IX. The application for emergency powers of the President of India under article 352 became controversial between the two leaders. The opinions between the two differed but it was agreed that central intervention in the State for internal disturbance could come only at the request or with the concurrence of the State government.

The agreement was discussed and debated in the Constituents Assembly on August 14, 1952. The opinions had tilt towards Kashmir than to Delhi. Most of the members maintained that the autonomy of the State be assured. To this extent they desired head of the State to be responsible to the State legislature and not to the President of India. Similarly others contended that the Sadari-Riyasat should continue in office till he enjoys the confidence of the State legislature. Another amendment wanted article 352 to be used at the request of "the Jammu and Kashmir State," and not of the government of the State. There was still another amendment which visualized a separate set of fundamental rights to be incorporated in the State constitution. There was none to defend the Indian government stand in the legislature.

The amendments were not accepted but the dominant opinion of internal autonomy prevailed.

During the period between August 1952 and August 1953, two major events in the political developments of Kashmir occurred. There was prolonged satyagraha in Jammu in late 1952 and early 1953, demanding full accession of the State to India. The agitation was launched by Praja Parishad in Jammu. Dogra had lost power in the State of J&K after one full century and they feared Kashmiri domination after the fall of Maharaja Hari Singh. Aware of the disadvantages of majoritarianism, they cried for full accession of the State to India so that Kasmiri Muslim majoritarianism would merge into the national majoritatianism of Hindu Culture. Therefore, they agitated that the State government, was ignoring them. They consequently boycotted elections in 1951 and started an overall agitation against the government throughout Jammu province. They leveled the following charges against the government as summed up by Sisir Gupta:-

1. Sheikh Abdullah had tried to Muslimize the State in the name of secularism.

2. There had been totalitarianism in the name of democracy.

3. Civil liberties had been attacked.

4. Steps had been taken towards the creation of an independent Kashmir.

5. The Delhi agreement was a betrayal.

6. It was leading to a victory of the communists whose intention it was to elevate the State to the status of a sovereign State, with its independence guaranteed by Peoples China and the U.S.S.R., besides India and Pakistan.

Sheikh Mohammad Abdullah, consequently, reacted sharply against the Jammu agitation. His government's

views were as follows:-

a) Agitation was the result of a reactionary communalist plan.

b) Dogra Rajputs were imperialistic in regard to Kashmir.

c) Land Reforms by the government were against the serfdom on which the Dogra Rule rested.

d) Abolition of Sahukari system was to change the socioeconomic position to the State and hence Dogra moneylender was apprehensive.

e) New laws were treated to be against Jammu people to protect Kashmir tenant.

f) The Praja Parishad was the creation of R.S.S and other reactionary forces in India.

However, in this struggle between the Praja Parishad and the government, Indian leadership and Parliament could not be on lookers. Nehru reacted against it sharply. As a result the Congress leaders favoured the government whereas R.S.S and Hindu Mahasabha favoured the agitators. Pt. Nehru, strongly pleaded in the parliament,

> "The strongest bonds that bind will not be of your armies or even of your constitution to which so much reference has been made but bonds which are stronger than the constitution and laws and armies - bonds that bind through love and affection and understanding."

There was correspondence on the Jammu agitation amongst Jana Sangh Chief, the Prime Minister of India and the Prime Minister of Kashmir which revealed the attitudes of leaders on the subject: whereas Mr. Nehru and Sheikh Mohammad Abdullah were of the opinion that the special status for Kashmir was conceded by the Indian constitution, Mr. Shyama Prasad Mukerji felt that the Jammu agitation

was the result of certain basic demands, of fears and doubts and hence he suggested to the Prime Ministers to deal with the agitation in a proper manner. However, most unfortunate occurrence during the Satyagraha period was the arrest and death in prison of the Jana Sangh leader Shayama Prasad Mukerji. Sisir Gupta writes, "while many have held the view that the Satyagraha in Jammu was ill conceived and was responsible for the transformation of Abdullah's views on accession to India, many others have felt that the Parishad had rendered a great national service by drawing attention to the ways and activities of Sheikh Abdullah."

By the time Shayama Prasad Mukerji passed away in the jail, the Sheikh had weened away from the central leadership. Most of the Central and State leadership and the governing elite at both levels foresaw danger in the statements of the Sheikh. As an unnatural consequence, in the early hours of August 9, 1953, Sheikh Abdullah was arrested at Gulmarg. He was handed - over, three documents on his arrest - letter from Mr. Bakshi, Shree Girdhari Lal Dogra and Pt Sham Lal Saraf expressing lack of confidence in him. The second document was an order of his dismissal as Prime Minister of J&K. The third document was the order of his arrest. Thus according to Balraj Puri Kashmir's relations with Delhi entered a phase of emotional rupture. Sheikh Abdullah was succeeded by his Deputy Prime Minister, Mr. Bakshi Gulam Mohammad as the Prime Minister of the State. On the very day he in a broadcast to his people over the radio explained the causes that led to the change in the government. Without naming the sheikh and his colleagues he said that there was foreign instigation behind his idea of an independent Kashmir. "While the Jana Sangh believed that it was the Russian Ambassador in Paris who patted him on the back, the communists were convinced that Adlai Stevension had been dangling the carrot before Abdullah." (Siser Gupta) On the other hand Sheikh Abdullah said that

if the accession was dissolved, the responsibility would be wholly of the Indian communalists who by demanding full merger with India had shaken the foundation of Indo- Kashmir relationship.

However, after the fall of Sheikh, Bakshi Ghulam Mohammad remained in power for about one decade. In his first broadcast to the people he said that the basis of the government's policy would be to draft a constitution as pledged by the leadership. He said that the preparation of the constitution is a sacred trust with his government. According to him the constitution was to be progressive and broad based in its nature and he thought it to be the guiding torch for democratic government. The J&K Constituent Assembly by and large remained the same except few members who were arrested with the Sheikh. Prominent amongst them was Mirza Mohd Afzal Beg. Shiekh Abdullah and his colleagues all along uptill the death of the former maintained that the action of the Sadari-Riyasat on 9th August 1953, was unconstitutional and illegitimate. Consequently all that followed according to them was also rendered illegitimate. In 1956, however, J&K constitution was adopted by the Constituent Assembly. Sheikh Abdullah was released from the Jail on January 8, 1958 and in his public speeches he was critical against Governments of the State and India. He accused the Constituent Assembly which framed the constitution of being a farce which had lost its representative character after his arrest. He dubbed the Assembly as illegitimate on the ground that most of the members were either arrested or coerced to submission or corrupted by the succeeding rulers.

Whatever the charges and the counter charges leveled by the National Conference led by Mr. Bakshi Ghulam Mohammad against the colleagues of Sheikh Mohammad Abdullah, the J&K constitution was drafted and adopted on Nov 17,1956. The constitution as adopted by the constituent

Assembly had 158 sections with six schedules. The constitution of J&K was later enforced in the State and the government of J&K since its enforcement is functioning in accordance with rules, principles and laws as enshrined in it.

In essence, the controversy between the National Conference led by Sheikh Mohammad Abdullah and the government of India since 1950 to 1956 and even after, is nothing but the confrontation on account of constitutional relationship. It is less on the issue of accession and more on the demarcations of centre-State relations. The National Conference led by Sheikh Mohammad Abdullah did not like to dispense with the powers beyond the three subjects which were granted by the Maharaja to the centre under instrument of accession. The centre desired more and more jurisdiction over the State particularly to the extent to which the State of J&K could be placed at par with other Indian States constitutionally. This controversy, however, could not even be solved by the Sheikh - Indra accord in 1975. The constitutional confrontation between the centre and the State of J&K continued during the life of Sheri -i- Kashmir Sheikh Mohammad Abdullah and in its under tones continues even today.

The State of J&K is distinctive amongst the Indian States, apart from its natural beauty, on account of its separate constitution. No other State in India has a separate constitution. The National Conference leadership had earlier under the scheme of Naya Kashmir visualized a democratic constitution for the State. The President of India issued an order extending the application of the Indian constitution, after the arrest of Sheikh Mohammad Abdullah in May 1954, but granted special powers to the State to legislate for safeguarding the rights of the local population. After the arrest of the Sheikh, the constitution was drafted and enacted and uptil 1973 as many as 262 central laws were applied to the State of J&K.

Since Praja Parishad movement was launched the confrontation between the central leadership and the Sheikh continued. While the controversy was temporarily settled through Delhi Agreement, yet its implementation according to Dr. Karan Singh was delayed. Dr. Karan Singh contends on the one hand that the Sheikh's all energies were concentrated to abolish the rule of Maharaja Hari Singh and on the other he justified the arrest of Sheikh Abdullah on account of the rift within the National Conference which came to open by July-August 1953. According to him the hardliners in the cabinet where led by M.A Beg, while most of the other senior leaders including G. L. Dogra, Shamlal Saraf and D. P Dhar had rallied behind Bakshi Ghulam Mohammad.

Sheikh Abdullah's detention, was departure for the National Conference from the stand that had been taken in 1947. Most of the Indian intellectuals call it betrayal of the Sheikh to his stand of accession to India. The National Conference (Muslims in particular) consider the encroachment on the constitutional relationship by Central Government beyond the scope of three subjects granted to the Centre under the instrument of accession as betrayal to Kashmiris.

The Sheikh was committed to Kashmir - neither to India nor to Pakistan. He was committed to nothing else. According to Quark the was the lion who was unrelenting in the exercise of territorial imperative. According to the Sheikh Kashmir acceded to India but did not merge with it and to him only communalists wanted that it should merge with it. If Kashmir has a special status within Indian constitutional framework it had a special status amongst Indian status as well. Once the Sheikh said on a martyr's day "The people of Kashmir have firm faith and confidence in the National Conference .... And for this reason, they do not care for anybody, be it General Zia or Mrs. Indra Gandhi." According to him the State did not exist between 1953-1975,

when he was not in power and he did not recognize the laws which came into force during this period. He demanded review of these laws under the Accord. Even a commission was appointed for the purpose. He became its Chairman. Its report did not see the light of the day.

The Sheikh's commitment to Kashmir virtually persisted uptill his death. Even after concluding "Kashmir Accord" with Mrs. Indira Gandhi he confronted every move which tried to encroach on existing constitutional relationship between the Centre and the State of J&K. whether it was Mrs. Indira Gandhi or Shree Zail Singh, he was not afraid to speak the truth as he deemed it. In the last three years of his regime before his death, Sheikh Abdullah according to Inder Malhotra was engaged in constant confrontation with the Centre. What he spoke during these years was in no way chewable with the Centre. However, most of what the Sheikh said was either forgotten or not cared for. The Indian press and the intellectuals sometimes criticised him for equating democratically elected Mrs. Indira Gandhi with Zia-ul-haq a military dictator. Sometimes according to them the Sheikh had sullied his shining record by encouraging communal and fundamentalist elements like Jamate-Islamia and Jameet-u -Tulba. To the press he was pastmaster by provoking the sentiments of the people by comparing the Moradabad riots in 1980 to Jallianwalla Bagh. He was held responsible by Inder Mahotra for the assault of income tax officers of the Union Government which tried to detect tax-evaders in Srinagar in 1981.

His last three years in power witnessed three major problems to deal with the Centre, which at times seemed to reach a breaking point. These three included the Commission appointed for the review of the laws applied to the state between 1953-1975 and appointment of Chief Justice of J&K High Court. Secondly, it related to the problems involved in Dulhasti Power Project in Jammu and lastly, Resettlement

Bill passed by the legislature of J&K. Inder Malhotra explaining the position writes,

"A great many things are happening including a deliberate hounding out of I.A.S. and I.P.S. officers of the Kashmir cadre who do not actually hail from the State. Attempts are also made to exclude from the State Central laws that have proved beneficial to its people. But that has fouled the atmosphere the most is the bill passed by the State Assembly to allow the return to Jammu & Kashmir of the "State subjects" who migrated to Pakistan 35 years ago and have since become Pakistani nationals."

However, after the death of the Sheikh, two major issues of confrontation were solved by the succeeding Chief Minister Dr Farooq Abdullah. In Dulhasti power project the principles of the Central Government were conceded and the agreement thereby concluded. The Resettlement Bill was returned to the State legislature without the assent of the governor but passed again by the State legislature. The bill was, however, referred to the Supreme Court for an opinion by the President of India - the advice is still awaited.

As Stated earlier, the State for the Sheikh did not exist during the period 1953-1975, until he regained power. Consequently, the constitution that was passed in 1956 had no meaning for the Sheikh - to him it was illegitimate as its members were arrested and removed in 1953. In a pamphlet "Kashmir: India and Pakistan", Sheikh Mohammad Abdullah wrote:-

> "In the meanwhile, a constituent Assembly was convened in Kashmir, but the Security Council in a resolution passed March 30,1961 affirmed that the convening of this Assembly and any action that the Assembly might take to determine the future shape and affiliation of the entire State or any part thereof would not be in accordance with principles already agreed upon - namely that the will of the people

was to be expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the united Nations."

Sheikh Abdullah further added that Sir B.N. Rao as leader of the Indian delegation to the Security Council Stated that the Indian constitution had provided a Constituent Assembly for the State of J&K to settle the details for the constitution of the State. The question whether the Constituent Assembly was to decide the issue of accession was different. However, it could express its opinion on the accession but this opinion could not bind the Indian Government or prejudice the position of the Security Council according to Rao. The Sheikh, whatever his stand was upto 1975 after his arrest in 1953, on regaining power in 1975 took the oath of secrecy under the same constitution. The constitution of J&K is in operation. It is a constitution within the Indian constitution and by and large a miniture Indian constitution. Let me in the pages ahead discuss the provisions of the Indian constitution dealing the relations between India and Kashmir under article 370.

CHAPTER II

KASHMIR SPECIAL STATUS

The post - partition period in the Indian subcontinent witnessed in Kashmir more uncertainty than any other princely State of India. But the National Conference and the Muslim Conference were striving for recognition as the sole voice of the people in the middle of 1946. The National Conference as a force of a national secular movement was determined to remove the maharaja to end the Dogra rule. Under an absolute uncertainty in the State, the Maharaja of Kashmir acceded to India on October 26, 1947. Immediately after the accession, an emergency administration, headed by Sheikh Mohammad Abdullah, was set up in the State. The Maharaja desired that the emergency administration operated within the authority of the Council of Ministers responsible to the Maharaja. This arrangement could not work. The National Conference leaders demanded that the ministerial establishment of the Maharaja should be abolished and all powers to be transferred to the Conference leaders. In November 1947, the Government of India advised the Maharaja to institute an interim government in the State with Sheikh Mohammad Abdullah as the Prime Minister. Pt. Nehru at this time wrote to the Maharaja that interim government should immediately be established on the model

of Mysore. In such a system a Dewan of the Maharaja was one of the ministers in the popular government. However, Sheikh Sahib was not satisfied with the model. The arrangement could not work and finally the Maharaja was asked by Sardar Patel to leave the State and on his departure he appointed his son Dr Karan Singh as a Regent. Dr. Karan Singh became the head of the State in the absence of his father. These developments took place in April May 1949 and thus the Sheikh became a truely constitutional Prime Minister of the State.

By November 1949, the constitution of India was adopted and finally enacted which was later enforced on 26th January 1950. The Indian constitution was drafted by a Constituent Assembly and earlier (1948) it had decided to fill up the four seats allotted to J&K State on the basis of nomination by the head of the State in consultation with the Cabinet and four Kashmiri representatives including Sheikh Abdullah had taken their seats in the Constituent Assembly on June 16, 1948. Pakistan lodged a strong protest against it at the time. The constitution of India so adopted provided that J&K State be governed in its relation with the Central government under article 370. As such arrangement was not available for any other Indian State, therefore, a special Status, emanated from the constitution of India with regard to J&K State.

The instrument of accession by the Maharaja of Kashmir, had transferred to the Government of India, the powers with regard to defence, external affairs and communication. This accession was limited and conditional, which consequently according to the leadership of the National Conference was temporary. The matters corresponding these powers were enumerated in the schedule attached to the instrument of accession. These matters referred to in the schedule are as under:-

a) The military, air and naval forces of the dominion,

armed forces, raised or maintained by the dominion, forces including the forces raised are maintained by acceding States attached to and operating with any of the armed forces of the dominion, naval, military and air - force works and the administration of cantonments, arms ammunition, and explosives.

b) External Affairs, treaties and agreements with other countries, extradition, admission into, emigration, expulsion from India, regulation of the movement of foreign nationals, pilgrimages to places outside India and naturalization.

c) Communications, posts and telegraphs, telephones, wireless, broadcasting and other forms of communication, railways, martine shipping and navigation, admirality jurisdiction, major ports, port quarantine, delimitation of port and port authorities, aircraft and air navigation; aerodromes, air-traffic, light houses, beacons, safety for shipping and aircraft, carriage of passengers and goods by sea and air police force of the railways.

d) Elections to the Dominion legislature, offences against laws with respect to any of the matters transferred to the Dominion of India, inquiries and statistics with regard to these matters and the jurisdiction of all courts with regard to these matters.

The controversy over the relations arose out of the schedule attached to the instrument of accession as this division of power between the centre and the State could not satisfy both. Different implications of this division of power became apparent immediately after the accession. The first controversy started with regard to the formation of the interim government. Neither the Central government nor the Government of Kashmir, particularly the emergency administration headed by Sheikh Mohammad Abdullah were clear about the demarcation of their powers. Further in between the government of India and the emergency administration

the government of the Maharaja stood uncertain. The Maharaja did not like to concede more powers to either Government of India or to the emergency administration and the Sheikh demanded not only more and more powers for his administration but full fledged responsible government. The Government of India got involved in the problem not only at the domestic level but at the international level with Pakistan. The slogan of plebiscite was a threat which Government of India was not prepared to risk. The Security Council as Dr. M.K. Teng asserts had a frontal blow to Nehru's idealism and India was in the dock explaining all else than that relevant to their complaint.

Natural consequence was that the Maharaja was asked to leave the State according to the wishes of Government of India on health grounds though his heir apparent Dr. Karan Singh confirms that his father was healthy. After the Maharaja left the State his son Dr. Karan singh, as Regent, initiated the consideration of the relations between the centre and the State. At this stage constitution of India was in the final phase of its making and hence the constitutional relationship between the State of J&K and Indian Union also came up for its incorporation in the constitution. The principles adopted in the integration of other States, however, were not followed in case of Kashmir. The issues, therefore, were discussed in a meeting held in Delhi in May 1949, between the Indian leaders and the leaders of J&K. The meeting resulted in deciding certain principles which could govern the relations between India and the State of J&K. These included:-

a) the constitution of the State of J&K would be framed by the people of the State through their representatives in the constituent Assembly.

b) Maharaja Hari Singh's future would be determined by the same constituent Assembly.

c) the divisions of powers between the centre and the State of J&K would be governed by the provisions of instrument of accession.

d) Constituent Assembly would decide the grant of further powers to the Central Government.

e) The powers relating to citizenship, fundamental rights and directive principles would be uniformly applicable to the State of J&K.

f) The Government of India would take over the operational and administrative control of the State armies.

As a result of these agreed principles when the draft Article 306-A was placed before the Constituent Assembly of India, the relationship between the Central Government and State of J&K were placed as under:-

1. The provisions of the constitution of India with regard to the Government in the other Indian States which had acceded to the dominion of India were not to apply to J&K, which reserved the power to draft a constitution for its government;

2. The State was empowered to convene a constituent Assembly representing the people of the State to draft the constitution of the State;

3. the Government was to have the power to legislate in regard to the State on the subjects enumerated in the Union list, which were declared by the President of India to correspond to the matters specified in the instrument of Accession and such other matters which the concurrence of the Government of the State, the President would by order specify;

4. the provisions of the constitution of India pertaining to citizenship, fundamental rights, and the directive principles of the State policy, embodied in the constitution of India were to apply to the State;

5. The other provisions of the constitution of India were to apply to the State by an order of the President, which he was empowered to issue with the concurrence of the Government of the State except in case of the matters incidental to the constitutional provisions for the government of the State and the subjects transferred to the Government of India under the instrument of Accession where the President was only required to consult the Government of the State;

6. the President was empowered to amend or repeal the special provisions for the State on the recommendations of the Constituent Assembly of the State.

Shortly after the above mentioned provisions were agreed, upon the Sheikh wrote to Gopalaswamy Ayangar that the working committee of the National Conference did not agree to the draft article of the Indian constitution. According to the National Conference leadership, apprehensions were that the draft article would affect the functioning of Kashmir Constituent Assembly and also they were fearful about the application of the provisions of the constitution of India with regard to citizenship and fundamental rights. According to them these laws were to affect the laws of the State. They feared that once fundamental rights were applicable to the State, the people from outside could acquire the land and prejudice the land reforms in the State. Consequently Ayanger redrafted the article and sent them to the National Conference leaders for approval. The revised draft omitted the provisions regarding fundamental rights and directive principles. This change according to some observers and commentators was to transfer to the State authority unrestricted powers but to the N.C. it meant the retention of autonomy envisaged under the Instrument of Accession. The revised draft was again rejected by the National Conference leadership. Finally, a revised draft was agreed upon between the two representatives-one from Central and the other from State leadership. The revised draft

was prepared by Ayangar in consultation with Mirza Mohd Afzal Beg. At the final sitting of drafting, even the subject pertaining to citizenship was also dropped out. During the discussion of the draft in the constituent Assembly, another controversy arose as to the definition of the Government of J&K. According to the National Conference leaders Government meant the Maharaja acting on the advice of the Council of Ministers, appointed under the Maharaja's proclamation dated 5th March 1948. Later, on the insistence of the members of the Assembly, it was redefined as the "Maharaja acting on the advice of the Council of Ministers for the time being in office under the Maharaja's proclamation dated 5th March 1948." This change was again not acceptable to the State leadership. However the provisions were passed by the Constituent Assembly as Ayangar had presented, with modifications but there was sharp reaction to the same by Sheikh Mohammad Abdullah. He threatened to resign from the Constituent Assembly alongwith his other members. The special provisions as they came to be included in the constitution, after persuading the National Conference leadership, finally, were embodied under the famous article of the Indian constitutions, known to almost every Kashmiri as Article 370. This article as it stood by 26th January 1950, runs as follows:-

1. Not with standing anything in this constitution –

a. The provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

b. the power of parliament to make laws for the said State shall be limited to –

i. those matters in the Union List and the concurrent list which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the instrument of Accession governing the accession of the State to the dominion of India as matters with respect to which the Dominion Legislature may make laws for the

State; and

ii. such other matters in the said List as, with the concurrence of the Government of the State, the president may by order specify.

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

2. If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (i) are in the second proviso to subclause (d) of that clause (b) given before the constituent Assembly for the purpose of forming the constitution of the State is convened it shall be placed before such Assembly for such decision as it may take thereon.

3. Not with standing anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

The State of Jammu and Kashmir is a part of Indian territory (the Ruler of the Jammu and Kashmir State executed the Instrument of Accession on 26-10-1947) and is included in the list of the first schedule of the constitution. But the position of this State differs from others States in the following respects:

i. The provisions dealing with governmental machinery in the State of the Union do not apply to the State of J&K.

ii.the legislative authority of the Union Parliament in respect of this State is limited to those matters in Union and

concurrent list, which are declared by the President, in consultation with the Government of State, to conform to the terms of the Instrument of the Accession.

iii.Only such of the other provisions of the constitution shall apply to this State as the President may by order specify.

Government under Article 370, in its explanations, was construed to mean the person recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's proclamation dated March 5, 1949. At the same time, it was noted in the explanation that Article I of the constitution of India was applicable to the State. Further it stipulated that other provisions of the Constitution of India were applicable to the State which were subject to such exceptions and modifications as the President might by order specify. However, there was limitation on this power of the President in case of the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) - such order could be issued in consultation with the Government of the State.

The constitutional position to the State referred to above under article 370, made the State of J&K distinct as compared to all other States of India. However, the constitution put the article 370 as temporary provision of the constitution, which meant that Indian Parliament can and could abrogate it. For reasons known to all, the Indian communalist even secular leadership of India except Pt. Nehru did not like the grant of special status to the State of J&K. The apprehensions in the National Conference leadership about the State's merger with Indian Union was already there but soon after these were confirmed by the Praja Parishad movement. The movement desired and aimed at State's full accession to India. Their slogan of complete integration of the State with India was expressed in the rallying cry "Ek Vidhan, ek nishan, ek pradhan: one constitution, one flag and one Presi-

dent." The constitution of India and later Delhi Agreement had conceded to the people of Kashmir a special status with distinction that its Chief Minister was termed as Prime Minister of J&K. Further, the flag of the National Conference (Halwala) was hoisting along with Indian flag on all Government offices in particular on secretariats. With regard to the head of the State, in the begining the State's head was the Maharaja, and later Dr. Karan Singh, as the elected head of the State. His office in J&K initial constitution was named as Sadari-Riyasat (State's President). Consequently, the Jammu people under the leadership of the Praja Parishad fought to abolish all the three distinctions of the State. One of the main reason for it was that Dogra's had lost power over Kashmiris after a century Rule and they could not reconcile with the idea that yesterday's subservient was today's master- that too over his own earlier master.

The movement caused the tragic events of 1953, when Sheikh Mohammad Abdullah was dismissed from Prime Ministership and arrested. Dr. Karan Singh issued three documents late at night on 8th August 1953 and these were served to the prime Minister of J&K on early hours of 9th August 1953 at Gulmarg where he was staying that time. The first document was a letter from Dr. Karan Singh addressed to Sheikh Mohammad Abdullah, informing him that there was conflict in later's cabinet. Second document was the order of dismissal which at the end said, "I, Karan Singh, Sadar-i-Riyasat, functioning in the interest of the people of the State who have reposed the responsibility and authority of the headship of the State in me, do hereby dismiss Sheikh Mohammad Abdullah from the Prime Ministership of the State of J&K, and consequently the Council of Ministers headed by him is dissolved forthwith." The third document handed-over to the Sheikh was his warrant of arrest.

After the dismissal of the Sheikh, Bakshi Ghulam Mohammad was sworn in as the Prime Minister of J&K

Consequently, It was under his leadership of the Constituent Assembly that the J&K constitution was enacted. Immediately after the government of India started eroding article 370 and the Sheikh and his party under the name of Plebiscite Front initiated protesting against these erosions. The plebiscite Front from time to time after 1956, continued defending the article. In a resolution the Plebiscite Front protested the Statement made by Mr. Govinda Menon in parliament that Government of India was ready to do away with article 370 of the Constitution in order to bring Kashmir closer with the rest of the country. Further it resolved,

"The plebiscite front further wants to make it clear in unambiguous terms that on its part, it considers article 370 of the constitution of India as the only basis for a relationship of Kashmir with India, on a temporary basis subject to plebiscite, and as and when this article is abrogated, India shall cease to have any locus-standi in Kashmir, which rightfully belongs to its people who alone are competent to be masters of their destiny and the people of Kashmir will be within their legal and constitutional rights to ask India to 'quit Kashmir."

The retention of autonomy of J&K, under Article 370 since its inclusion in the Indian constitution, was a continuous passion of the Sheikh particularly upto the Accord of 1974. The Agreement was entered into by the Sheikh and Mrs. Indra Gandhi. However, all along the years 1952 - 1974, the government of India on the other hand, tried to erode the article. B.L. Sharma writing in 1967, in his book the Story of Kashmir, reflects on this attitude in the following words:-

"Agitation has been growing in India for erosion of Article 370 of the constitution of India which, apart from article I under which the State is included among territories comprising the Union of India, determines the State's relations with the Union Government. Under this Article several central Acts on matters corresponding to items men-

eral central Acts on matters corresponding to items mentioned in the schedule to the Instrument of Accession have been extended to the State in consultation with its Government. Similarly, several provisions of the constitution of India have been extended to Jammu and Kashmir at the request or with the consent of the State Government. The process is continuous and irreversible. The designation of Prime Minister has been changed to Chief Minister and of the Sadar-i-Riyasat to Governor and in many other ways the State is coming in line with other States of the Union. While Article 370 is not likely to atrophy too soon, pressure for continuous action under its provisions is bound to grow within and outside the State."

The process continued uptill 1974, when the Sheikh Indra Accord was concluded. By the time most of the central laws were operative in the State of J&K. There is hardly anything left in Article 370, which has not been accomplished in accordance with the wishes of the central leaders. However, the agreed upon conclusions in 1974 Accord are worth mentioning to ascertain the position of the "special status" Kashmir enjoyed before the Delhi Agreement of 1952. These conclusions are:-

1. The State of Jammu and Kashmir, which is a constituent unit of the Union of India, shall in its relations with the Union, continue to be governed by Article 370 of the constitution of India.

2. The residuary powers of legislation shall remain with the State; however, Parliament will continue to have power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution.

3. Where any provision of the constitution of India had been applied to the State of Jammu and Kashmir with adaptations and modifications, such adaptations and modifications can be altered or repeated by an order of the President under Article 370, each individual proposal in this behalf being considered on its merits; but provisions of the constitution of India already applied to the State of Jammu and Kashmir without adaptation or modification are unalterable.

4. With a view to assuring freedom of the State of Jammu and Kashmir to have its own legislation on matters like welfare measures, cultural matters, social security, personal law, and procedural laws, in a manner suited to the special conditions in the State, it is agreed that the State Government can review the laws made by Parliament or extended to the State after 1953 on any matter relating to the concurrent list and may decide which of them, in its opinion, needs amendment or repeal. Thereafter, appropriate steps may be taken under Article 254 of the constitution of India. The grant of President's assent to such legislation would be sympathetically considered. The same approach would be adopted in regard to the laws to be made by parliament in future under the proviso to clause 2 of that Article; the State Government shall be consulted regarding the application of any such law to the State and views of the State Government shall receive the fullest consideration.

5. As an arrangement reciprocal to what has been provided Article 368, a suitable modification of that Article as applied to the State should be made by Presidential order to the effect that no law made by the legislature of the State of Jammu and Kashmir, seeking to make any change in or in the effect of any provision of the constitution of the State of Jammu and Kashmir relating to any of the under mentioned matters shall take effect unless the Bill, having been reserved for assent; the matters are:

a. The appointment, powers, functions, duties, privileges

and immunities of the Governor and

b. the following matters relating to Elections by the Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult sufferage, and composition of the legislative council, being matters specified in sections 138, 139, 140 and 50 of the constitution of the State of Jammu and Kashmir.

6. No agreement was possible on the question of nomenclature of the Governor and Chief Minister and matter was therefore remitted to the principals.

The agreed upon conclusion decide, beyond doubt, that the erosions of article 370 from 1952 onwards were confirmed by the National Conference top -notchers, particularly Sheikh Mohammad Abdullah and Mirza Mohd Afzal Beg. Article 370, has been, as we have discussed a controversial article of the Indian constitution. To the majority of the State it is a guarantee of an internal autonomy and to the minority like the Jammu Dogra it is pledging its allegiance to the hegemony of the majority. From 1939, when the All J&K Muslim Conference was converted to All J&K National Conference, the Congress leaders uptill 1951, treated Kashmir and its leadership with a special care. They termed each other as brothers and close associates -consequently when they had to settle their relations in 1949 they settled it under Article 370. Thus Article 370 was the temptation in 1949 for the Kashmir leadership to fall in 1953. In the present context article 370 dominates the age of Kashmir since 1950, in particular the political thinking outlook and activity of the Muslims of Kashmir. According to Toynbee "the spirit of nationalism is sour ferment of the new wine of democracy in the old bottles of tribalism." This sour ferment in the new wine of socialism, secularism and democracy with Kashmir leadership has reduced them to identify themselves with Article 370 of Indian Constitution, possibly to retain what they had lost in 1947. The Article 370, to the leadership, was

the temptation of Eve and without Man's fall, God would be unable to reveal his self- scarificing love. Thus article 370, to a Kashmiri has become a symbol, in the common medieval sense, a symbol comparable to a tree of "Death and Life." The more the attempt to erode, the more reaction it would produce. The underlying spirit behind article 370, rests with the extent of the pulls on it from the peoples of Jammu and Ladakh. The pulls will determine whether the relationship between the centre and the State are reduced to Zero or to infinity. Presently it has been reduced to zero.

CHAPTER III

CENTRE-STATE RELATIONS

Before 1947, the struggle for freedom in Kashmir, had demonstrated a unity of the people in the absence of opportunism and self-interest. The interests before 1947 were collective-all sectarian interests were defeated. Immediately after the accession of the State to India struggle for power ensued. This led to the politics of Centre-State relations. The Centre-State relations or what is termed as constitutional relationship between J&K State and Indian Union were first talked by Sheikh Mohammad Abdullah when in 1952 before Constituent Assembly he desired to make a Statement on it. At that time he said that in the first session "Basic Principles Committee" of the Constituent Assembly had reported as to the principles for the election of the head of the State which the drafting committee had to consider and report back to the Assembly. The Sheikh informed the house at this stage, "since the changes proposed by this Assembly involved corresponding adjustments in the Indian constitution, the Government of India desired that it should have time to discuss with our representative other matters pertaining to the constitutional relationship of our State with the Union. During last stage of those discussions, it became necessary for me and some of my other colleagues in the

government to participate in the talks."

Earlier, the accession of the State to the Indian Union had taken place. This accession, under the circumstances prevailing in 1947, had many compulsions for the Sheikh. Firstly, according to the Sheikh, "After the Independence Act of 1947 was passed by the British Parliament, the Dominion status was conferred on India and Pakistan; and British Paramountey having lapsed, the Indian States became independent. They were, however, advised to join either of these two dominions." According to the sheikh it was tragic commentary on these arrangements proposed by the British Government that the position of these Indian States, comprising one fourth of the total population of the entire Indian sub-continent, was left absolutely vague, subjecting the future of State's people to the whims of their respective rulers. Secondly, the Maharaja of Kashmir did not take decision with regard to the accession of the State. While the State was under uncertainty, national movement was seeking complete transfer of power, the Maharaja was oppressing the national movement, the people in Poonch rebelled and Pakistan encouraged raiders, the National Conference stepped in to avert the State from annihilation. This could be done by seeking help from India - she was not prepared to assist without accession. The Maharaja acted in response to the leadership or under the compulsions of circumstances by acceding to India through the instrument of Accession.

The basis of the States constitutional relationship with the Union of India, therefore, is the same Instrument of Accession including its schedules. In accordance with the terms of Accession, certain powers were transferred to the Centre. The principal matters specified for this purpose in respect to which the Dominion Legislature could make laws for this State were:-

1. Defence
2. External Affairs, and

3. Communication.

This arrangement, the Sheikh said, involved a division of powers which is the normal feature of a federation. Beyond the powers transferred by it to the Dominion, the State enjoyed complete residuary powers. However, these relations were also to be incorporated in the Indian constitution or corresponding adjustment had to take place. To this effect four members were nominated in the Constituent Assembly of India, Sheikh Mohammad Abdullah was included amongst them. At the time the representatives of the J&K State, reiterated their stand that the States association with India should be based on the terms of the Instruments of Accession. It was also made clear that while the accession of the J&K State with India was complete in fact and law to the extent of the subjects enumerated in the instrument, the autonomy of the State with regard to all other subjects outside the ambit of the Instrument of Accession was to be preserved. Accordingly, article 370 was drafted and incorporated in the Indian Constitution, to determine the future relations between the Centre and the State of J&K. The division of powers between the State of J&K and Union government is, therefore, determined in accordance with the provisions of Article 370. Whereas, the Constitution of India in its federal structure assumes even residuary powers to the Union government, in case of J&K it left the residuary powers to the State. However, it envisages the change in relations through such amendments and modifications by the orders (Application to J&K), promulgated by the President of India from time to time. However, Article 370, in its original and unamended form did provide full autonomy subject to the application of the provisions of the Indian constitution in future. Earlier, as discussed elsewhere, Article 370 stipulated the following limitations on the Parliament of India, to make laws for the State:-

a) Those matters in the Union List and the concurrent

list, which in consultation with the Government of State, were declared by the President to correspond to matters specified in the Instrument of Accession as the Dominion Legislature had the power to legislate for the State and;

b) Such other matters in the union list and the concurrent list, as were specified by the President of India with the concurrence of the Government of the State.

Obviously, the powers not transferred to the union Government, in other words the residuary powers, were retained by the State. The zealots of bringing the State at par constitutionally with other States, knew well the lacune in the article. The power of the President of India to apply various provisions of Indian constitution on State of J&K, emanated from the power that he could specify any matter from the Union and Concurrent List with the concurrence of the State Government. Immediately after the fall of the Sheikh in 1953, this scheme of distribution of powers between the two Governments was drastically altered in 1954, when the President of India promulgated the constitution (Application to J&K order, 1954) and part XI of the Indian constitution was made applicable to the State. The provisions of the part XI of the Indian constitution deal with legislative, administrative and financial relations between the Union Government and the States. However, the provisions of the Indian Constitution applied to J&K under order 1954 was issued with certain modifications. Presidential orders from time to time further defined the two centres of power. According to Dr. Teng pruning and modifying the reservations imposed on the application of the provisions of the constitution of India to the State were a continuous process after 1954 order. Thus the powers transferred to the Union Government for its exclusive operation are specified in the Union List as subjects with regard to which the provisions of the seventh schedule are applicable to the State. The powers within the concurrent sphere of the two Governments are specified in the concurrent list as the subjects with regard to which the provisions of the seventh schedule are applicable to the State. The powers not included in these two categories are retained by the State as residuary powers.

The legislative relations between the State of J&K and the union is governed by the same scheme of division of powers as it exists for other States. The scheme visualizes three categories of subjects provided in the Union list, concurrent list and the State list. The first and the last lists are the exclusive powers given to the union and the States respectively. The concurrent list provides the subjects which are exercisable both by centre and the States --however, in case of a conflict, the law of the Parliament prevails. However, in case of J&K, certain reservations and modifications have been made. It provides that the provisions of seventh schedule are applicable to the State in regard to the Union list and the Concurrent list with certain exceptions. The Parliament of India is competent to legislate in relation to the State of Jammu and Kashmir on the following subjects in the Union list:-

1) Defence of India and every part thereof;

   Naval, military and air forces;

   Administration of cantonments;

   Naval, military and air force works;

   Arms, fire arms, ammunition and explosives;

   Atomic energy and mineral resources necessary for its production;

   Industries declared by parliament to be necessary for Defence.

2) Foreign Affair;

   Diplomatic, consular and trade representatives;

United Nations organization;

Participation in international conférences, associations etc;

War and peace;

Foreign jurisdiction.

3) Citizenship, naturalization and aliens;

Extradition;

Passports and visas;

Pilgrimages to places outside India.

4) Piracies and crimes committed on the high seas or in the air;

Railways and Highways declared by Parliament as National Highways;

Shipping and Navigation declared by law of the Parliament to be national water ways; Martine shipping and Navigation;

Light-houses, including light-ships and beacons;

Ports declared by Parliament to be of national importance and matters thereto and port quarantine seamen's and marine hospitals.

5) Airways and its related matters;

Carriage of passengers and goods by railways;

Posts and telegraphs, telephones, wireless, broadcasting and other forms of communications;

Property of the Union and the revenue there from.

6) Public Debt of the union;

currency, coinage and legal tender and foreign exchange. Foreign loans, Reserve Bank of India, Post Office Savings Bank, Lotteries, trade and commerce with foreign Countries, inter State trade and com

merce, incorporation, insurance and cooperatives. Banking, Bills of exchange, cheques, provisory notes, stock exchange and future markets, patents, inven tions and designs, copyrights, trade marks and establishment of standards of weights and measures. Establishment of standards of quality for goods to be exported out of India.

7) Industries declared to be of national significance by the Parliament of India. Regulation and development of Oil fields and mineral oil resources, petroleum and its products. Regulation of mines, labour and safety in mines. Regulation and development of inter-State rivers and river valleys-to be declared by Parliament by law to be taken over in public Interest. Fishing and fisheries beyond territorial waters. Manufacture, supply and distribution of salt by union agencies.

8) Cultivation, manufacture and sale for export of opium. Industrial disputes concerning union employees. The National library, Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian war Memorial and any other like institutions financed by the Government of India, to be declared as of national importance by the Parliament. The institution like Banaras Hindu University, Muslim University and the Delhi University and any other institution declared by Parliament by law to be institu tion of national importance.

9) Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by the Parliament by law to be institution of national importance, Union agencies and in stitutions for:-

i. Professional, vocational or technical training,

including the training of Police officers; or

ii. the promotion of special studies or research;

iii. scientific or technical assistance in the investigation and detection of crime. Coordination and determination of standards in institutions for higher-education or research or scientific or technical institutions. Ancient and historical monuments and archaeological sites and remains declared by parliament by law to be of national importance. The survey of India, the Geological, Botanical, Zoological and Anthropological surveys of India; Meteorological organizations and Census.

10) Union public services, All India services, Union Public Service Commission, Union pensions, that is to say, Pensions payable by the Government of India or out of the consolidated fund of India.

11) Elections to the Parliament, to the legislature of the States and to the offices of President and Vice-President and the elections commission. Salaries and allowances of the members of the Parliament, the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the people. Powers, Privileges and immunities of each House of Parliament and of the members and the committees of each House; enforcement of attendance of persons for giving evidence or producing document before the committee of Parliament or commissions appointed by Parliament. Emoluments, allowances, privileges and rights in respect of leave or absence, of the President and Governors salaries and allowances of the Ministers of the Union, the salaries and allowances and rights in respect of leave and other conditions of the service of the Comptroller and Auditor General of India. Audit of the accounts of the Union and the States.

12) Constitution and the organization, jurisdiction and powers of the Supreme Court including contempt of such court, and the fees taken therein; persons entitled to practice. Organizations and constitution of the High Courts, except provisions as to the officers and servants of the High Courts; persons entitled to practice before the High Courts.

13) Extension of the powers and jurisdiction of members of a police force belonging to any State or to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which the area is situated; extension of the powers and the jurisdiction of members of a police force belonging to any State to railway are as outside that State. Inter-State quarantine. Taxes on income other than agricultural income. Duties of custom including export duties. Duties of exercise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption and opium, Indian hemp and other narcotic drugs, corporation tax. Taxes on capital value of assets, exclusive of agricultural land of individuals and companies; taxes on capital of companies. Estate duty in respect of property other than agricultural land. Duties in respect of secession to property other than agriculture land. Terminal taxes on goods or passengers, carried by railways, sea or air; taxes on railway fairs and freights. Taxes other than stamp duties on transaction in stock exchanges and futures markets. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lending, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. Taxes on the sale and purchase of newspapers and

on advertisements published therein. Taxes on sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce, offences against laws with respect to any of the matters in this list. Inquir ies, surveys and statistics for the purpose of any of - the matters in this list. Jurisdiction and powers of all courts, except the Supreme court with respect to any of the matters in this list and admiralty jurisdiction.

14) Fees in respect of any of the matters in this list but not including fees taken in any court. Prevention of activities directed towards, disclaiming, questioning or disrupting the sovereignty and the territorial integrity of India or bringing about cession of a part of territory of India or secession of a part of territory of India from the union or causing insult to the Indian National Flag, the Indian National anthem and the Constitution.

The second list of jurisdictions namely the concurrent list; the following subjects are exercisable both by the central Government and the Government of J&K:-

The State of J&K and the Central Government having Power to remove from one State to another State prisoners, accused persons or persons subjected to preventive detention for reasons specified in Entry 3 of the concurrent list and can legislate, with regard to such persons. Further Administrators-general and official trustees can be removed or transferred. Luncy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient. Adulteration of food-stuffs and other goods can also be dealt with under this head. Drugs and poisons, subject to the provisions of entry 59 of central list with respect to opium can also be legislated.

Trade unions; industrial and labour disputes, social security and insurance; employment and unemployment.

Welfare of labour including conditions of work, provident funds, employer's liability, workman's compensation, invalidity and old age pensions and maternity benefits. Vocational and technical training of labour, legal, medical and other professions. Vital statistics including registration of births and deaths. Trade and commerce in, and the production, supply and distribution of products of industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest and imported goods of the same kind. These goods include foodstuffs, edible oil-seeds and oils, cattle fodders including oil cakes and other concentrates. Further raw cotton, ginned or unginned and raw jute are included in it.

Price control, mechanically propelled vehicles, factories, newspapers, books and printing presses are included in the concurrent list. Inquiries and statistics for the purposes of any of the matters specified in this list. Jurisdiction and powers of all courts, except of any of the matters specified in this list-fees in respect of any matters in this list, but not including fees taken in any court.

The Union Government has exclusive powers to legislate in relation to J&K on a specific field of subjects from the Union list. Earlier to it the Union Government had power to legislate on some specific subject from the concurrent list. As a result those powers either from Union list and concurrent which are not applied to the State of J&K and also residuary powers remain with the State Government. The enumeration of powers in the State list of the seventh schedule is not applicable to the State. Nor is entry 97 of the Union list, vesting the residuary powers of the legislation in the Parliament, applicable to the J&K State. Thus the powers, which remain with the Government of J&K are as Under:-

a) the powers which are enumerated in the Union list but are not applicable to the State of J&K include Central Bureau of Intelligence and Investigation, Preventive deten-

tion connected with defense, the security of India and persons subject to such detention. Also are included the courts of wards from the estates of the Rulers of the Union Princes, sanctioning of cinematograph films for exhibition and extension of the jurisdiction of High Courts and inter-State migration.

b) the powers which are enumerated in the concurrent list but are not applicable to the State of J&K include criminal procedure, preventive detention, the maintenance of public order, maintenance of supplies and services essential to the community; marriage, divorce, infants and minors, adoption, wills, intestacy and succession. It includes further joint family, and partition and personal law the transfer of property other than agricultural land , registration of deeds and documents, contracts including partnership, agency contracts of carriage and other special forms of contract but not including contracts relating to agricultural land, actionable wrongs, bankruptcy and insolvency, trusts and trustees, evidence and oaths, recognition of laws, public acts and records and judicial proceedings, civil procedure, contempt of courts except the contempt of Supreme Court, vagrancy, nomadic and migratory tribes, prevention of cruelty to animals, economic and social planning, commercial and industrial monopolies, combines and trusts, relief and rehabilitation of persons displaced by setting up of India and Pakistan, charities and charitable institution charitable and religious endowments and religious institution. It also includes prevention of the infectious or contagious diseases and pests affecting men, animal or plants, ports, shipping and navigation, inland waterways as regards mechanically propelled vessels, boilers, electricity, archaeological sites and remains, management and disposal of evacuee property, recovery of claims in respect of taxes and other public demands and arrears of land revenue, stamp duties other than judicial stamps.

c) All powers provided in State list.

d) All other residuary powers - entry 97 of the seventh schedule is not applicable, to the State.

The division of powers with regard to the legislative powers is final because neither the Union Government nor the State Governments can change or alter them. Any change in this relationship can happen through constitutional amendment. However, there are certain circumstances under which the Parliament is empowered to enact legislation. Such conditions are:-

1. When the Rajya Sabha recommends by a resolution supported by two thirds majority of the members present and voting that it is in the national interest to do so;

2. when by resolution, the houses of the legislatures of two or more States voluntarily authorize the Prliament to do so;

3. When the Union Government finds it necessary to legislate on the State list to implement treaty obligations undertaken by the Government of India; and

4. When a State of emergency is in operation.

There are only two exceptions where the Union Parliament cannot legislate with regard to the State of J&K.

The first being article 249, which does not apply to the State and secondly Parliament cannot assume powers to legislate residuary powers vested with the State. However, to sum up, one has to look at the legislative relationship on the position of Parliament being over and above the legislature of the State. For example, article 246, and article 254 of the constitution of India are applicable to the State without any reservation. Indian parliament has exclusive right to legislate on Union list. In case of subjects enumerated in concurrent list, the Parliament prevails in case of conflict between any State and the centre. Thus federal principles of Indian

polity govern the State of J&K as well. The division of power as discussed above does not vest with the State Governments more substantial powers than those vested with the other State Governments. It does not leave any large number of subjects in the residuary. Those of the subject left to the State from the Union list are unimportant. The residuary powers could be of some importance but for lists provided in the constitution. These three lists, Union, Concurrent and State lists are so exhaustive that nothing remains in the residuary. Dr M.K. Teng asserts, "In fact the constitution has made the enumeration various in the lists so exhaustive that little or nothing is left in the residuary field and it is doubtful whether the categories in the lists would ever be exhausted." He further adds that, "There is plausible ground to believe that the residuary powers, vested as they are with the Union Government by the constitution of India, could be used as the last resort by the Union Government if and when the necessity was felt. The location of the residuary powers with the Union Government as a characteristic features of the Indian federal structure. It is, however, doubtful, whether a State Government could meaningfully utilize the residuary powers to any advantage within the complex federal relationship the constitution envisages."

In administrative relations between the State of J&K and the union of India, the line is more thin. Under Indian constitution the administrative competence of the State extends over all fields of legislative powers in the State. In practice, however, what happens is different owing to the technique provided in the Indian Constitution. This coordination, therefore, is supposed to be the satisfactory functions of the administrative processes of the Union. Thus the following provisions aim at it :-

a) The executive powers of the States are so exercised as to ensure compliance with the laws made by the Parliament.

b) The Union is empowered to issue directions to the State Governments to ensure that their administrative operations do not impede and prejudice the executive powers of the Union.

c) The Union Government is empowered to issue directions to a State Government to remove any obstacles and difficulties for a Union agency to function in the State.

d) The Union Government is empowered to issue special directions in the construction and maintenance of the means of communication which are of national and military importance and the protection of the railways.

e) Full faith and credit is given to public acts, records and judicial proceedings of the Union and the States in all parts of the Indian territory.

f) The Union Government is empowered to deal with the waters of inter-State rivers and river-valleys.

g) The Union Government is empowered to settle inter-State disputes.

These all provisions of the Indian constitution are applicable to the State of J&K.

It means that the administrative powers of the State Government is subject to the same limitations of the Union control, as administrative powers of other States of India are limited. The Government of J&K is required to exercise its executive power in such a way that compliance with the laws made by the Parliament is ensured. The Union Government is empowered to give the State Government directions considered necessary for this purpose. In case of J&K State the constitution of India puts the provisions as under:-

" The State of J & K shall so exercise its executive power as to facilitate the discharge by the union of its duties and responsibilities under the constitution in relation to that State; and in particular, the said State shall, if so required by the

union, acquire or requisition property on behalf of and at the expenses of the Union, or in default of agreement, as may be determined by an arbitrator appointed by the chief Justice of India."

Further the State of J&K is subject to the specific obligation to refrain from acts which impede and hamper the executive power of the Union. In addition to comply the directions from the Central Government. The Union Government can specifically give directions to the State Government in regard to:-

a) the construction and maintenance of the means of national or military importance.

b) Protection of railways within the State.

Secondly, if the State Government fails to comply the instructions issued by the Central Government the President of India is empowered to declare that the State Government has failed in its performance of constitutional obligations and hence assume all or any powers of the State Government. During the operation of the emergency, the President is entitled to assume all or any powers of the State Government and also order that the powers of the State legislature are exercised by or under the authority of the Parliament. However, article 365 of the Indian constitution is not applicable to the State and hence remedial measures are not available to the Union Government in regard to J&K State. Such remedial powers in case of conflict between the centre and the State are used at rare times, so even if these are denied to the centre, yet it can use many other powers of the constitution to protect its interests in the State. Though the Constitution provides that the application of constitution of India in many cases of relations is subject to the recommendations to the President, yet the same can be secured by other means. For example the President can issue an instruction to the State Government to recommend a measure as they deem fit in national interest or public good.

In compliance with provisions of Article 261 of the constitution of India, full faith and credit must be given to public acts, records and judicial proceedings of the Union and the States in all parts of India. The manner, in which these acts and records are proved and their effects determined, is provided by parliamentary enactments. This is not so in case of J&K. Article 261 as it is applicable to the Jammu and Kashmir State reads:-

1) Full faith and credit shall be given throughout the territories of India to public acts, records, and judicial proceedings of the Union and of every State.

2) The manner in which and the conditions under which the acts, records and proceeding referred to in clause (i) shall be proved and the effect thereof determined shall be as provided by law.

3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution within that territory according to law. Constitution (Application to J&K) order, 1954, Para 6 (b).

To regulate the administrative machinery of the country and also to ensure coordination of policy and action between the Central and State administration, the constitution of India, empowers the President to appoint an inter-State council, if need be. The State of J&K is placed under these provisions.

Naturally, the State is subject to the President's powers and Council's operatives in this regard. The Council is entrusted with the following functions;

a) to enquire into and advise upon disputes between the State;

b) to investigate and discuss the subjects which are of common interest between the Union and the States; and

c) to recommend measures for the better coordination

of policy and action with respect to these subject of common interest.

So far we have discussed legislative and administrative relations between the Central Government and the Government of J&K and we have found beyond doubt that there is no significant difference between these relations and that of other States in India. Let us now examine the financial implications in these relations and finally assess whether special status means anything.

The financial relations between the centre and the States under the Indian constitution are as elaborate as other relations. The powers of the Union Government and the State Governments to levy taxes, are separately defined and made mutually exclusive. There is very little left in concurrent list in regard to financial position of the centre and the States except that provisions are made to empower the Union to levy and collect certain taxes and share certain tax returns with the States. In the allocation of the sources; however, for the centre and the States the constitution provides exclusive sources-one for Union Government and another for State Government. However, there are duties levied by the Union but assigned to the States. The duties levied by the Union but collected and appropriated by the States, and the duties levied by the Union and distributed between the Union and the States. They are divided as under:-

(A) Union sources: - Property and public debt of the Union Duties of customs and export duties, currency, coinage and legal tender. Foreign loans, Post office savings bank and Corporation tax. Duties of excise on tobacco and goods manufactured and produced in India. Fees in respect of any of the matters in the Union list, but not including any fees taken in any court. It includes also lotteries, posts and telegraphs, telephones, wireless broadcasting and other communication. Further are added railway fares and freights, stamp duty in respect of bills of exchange, cheques, promissory notes, reserve bank of India, taxes on income other than agricultural income, taxes on capital value of the assets, exclusive of agricultural land of individuals and companies, estate duty in respect of property other than agricultural land, duties in respect of succession to property other than agricultural land, terminal taxes on goods, passengers carried by railways, sea and air. Taxes other than stamp duties on transaction in stock exchanges and future markets, taxes on the sale or purchase of newspapers with taxes on capital value of assets exclusive of agricultural land of individuals and companies are included in the Union sources.

(B) State Sources: - These include land revenue, taxes on agricultural income, taxes on land and buildings and taxes on mineral rights subject to limitations imposed by the Parliament relating to mineral development. Duties in respect of succession to agricultural land, estate duty in respect of agricultural land and duties of excise on goods manufactured and produced in the States, such as alcohols, opium narcotics and narcotic drugs. Taxes on sale and consumption of electricity, taxes on the entry of goods into a local area for consumption, use and its sale. Taxes on sale and purchase of goods other than newspapers and capital taxes. Taxes on goods and passengers carried by road or on inland water-ways -fees in respect of any matters in the State list except the fees taken in any court. Stamp duty in respect of documents other than those specified in the Union list and taxes on advertisements except those published in the newspapers. Taxes on vehicles, taxes on animals and boats - tools, taxes on professions, trades, callings and employments, taxes on luxuries, including taxes on entertainment, amusements, betting and gambling are included in the State sources.

(C) Taxes levied and collected by the union but assigned to the States: These taxes include duties in respect of succession to property other than agricultural land and estates duty on property other than agricultural land. It fur-

ther includes terminal taxes on goods or passengers carried by railway, sea, air and taxes on railway fares and freights. The taxes other than stamp duties on transactions in stock exchanges and future markets, taxes on the sale and purchase of newspapers and on advertisements published therein. Taxes on the sale and purchase of goods other than newspapers where such sale or purchase taxes place in the course of inter-state trade and commerce.

Stamp duties and duties of excise on medicinal and toilet preparations mentioned in the Union list levied by the Government of India and collected and appropriated by the State except in case where such duties are livable within a Union territory, are included in the duties which are levied by the Union but are collected and appropriated by the States.

(D) Taxes levied and collected by the Union but distributed between the Union and the States: These taxes include taxes on income other than agricultural income and Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union list and collected by the Government of India.

In short the financial powers underlined above envisage two main principles. First is the division of powers with regard to levying of the tax and the second provides the scheme as to how to distribute the revenues between the centre and the states. Distribution of revenues, however, is based on the principle of the needs and requirements. Consequently, as a matter of principle the division of the taxing powers and the financial resources between the Union and the J&K State follows the overall principles as discussed above. Provision with regard to the taxes and duties levied by the Union and collected and appropriated by the states or taxes levied by the Union and divided between the Union and the States are applicable to the State of J&K as well. The reservation made in favors of the State is that entry 97 of the Union list is not applicable to the State and the residuary

powers of taxation are not transferred to the Union but are vested with the State. Further, in the scheme of financial division of powers, a system of grants-in-aid is devised. These grants-in-aid are provided for the states so that regional disparities and economic stresses are met by the states. These grants-in-aid are given to the states in addition to the assignments of the various tax-proceeds including those shared with the Union Government. The State of J&K is covered by the constitutional provisions pertaining to the grants-in-aid. The constitution of India also empowers the President of India to appoint a Finance Commission every five years to advise the President with regard to the distribution of revenues between the Union and the States. The Finance Commission so appointed covers Jammu and Kashmir State as well. The Commission distributes grants-in-aid and other financial assistance to the State of Jammu and Kashmir. However, the financial powers between the Union and the States are enjoyed by the Parliament of India. Several prohibitions are imposed on the power of the States to impose taxes on the Union activities. The State of Jammu and Kashmir is also subject to the paramount power of the Union in the same manner as the other Indian States. The exception to it with regard to the state of Jammu and Kashmir is that the residuary powers of taxation are reserved for the State Government; where as the other Indian states are not vested with any residuary powers of taxation.

We have discussed in an earlier chapter that the relationship between the Union of India and the State of Jammu and Kashmir immediately after the accession of the State with India was determined by the instrument of Accession, which was, made by the late Maharaja of the State. In response to the accession the Governor General of India and later Government of India subjected it to the right of plebiscite. The leadership of the National Conference, particularly the Sheikh desired the removal of the Maharaja. The Maharaja on the other hand resisted the full merger of the

State with the Union of India and tried to retain as much powers as he could. The Maharaja was made to quit and under the constitution of Jammu and Kashmir the head of the State was made Elective office. Dr. Karan Singh was first appointed a regent and later elected to the office of Sadar-i-Riyasat. In 1952 the Delhi Agreement was concluded and certain legal and constitutional relations were determined under the Agreement. However the Delhi agreement could not work out financial agreement between the Central Government and the State. After the fall off Sheikh Abdullah from power in 1953 the special position of the State rapidly eroded. The change continued till 1975 when Accord between Sheikh Abdullah and Mrs. Indira Gandhi was concluded. The first Presidential order was issued in 1954 when the constitution (application to Jammu and Kashmir) order 1954 C, O. 48 was issued. Since then as many as twenty eight orders have been issued from time to time. Before 1954 order (Presidential) only one order of this type was issued in 1950. Still further the various central acts were applied to the State from time to time making the State of Jammu and Kashmir completely subservient to the constitution of India and thereby the Parliament of India.

Uptill ending 1973 as many as 262 central Acts were applied to the State of Jammu and Kashmir. Thus, the wider area of autonomy which includes a separate constitutional structure for the State has drastically changed. The fundamental issue that divided the State leadership and that of the Union leadership uptil the death of Sheikh Abdullah was to the quantum of autonomy the State deserved under Article 370.

The discussions so far reveal that the autonomy of the State which it enjoyed in 1948 has by now been reduced to almost zero. However, the exception is that the State legislature has a right to frame and construct rules and regulations for the permanent residents or what is called State subjects

and to define their rights and obligations. With regard to the State subjects Dr. M. K. Teng asserts, "the interests of the State subjects are needed to be safeguarded, particularly in view of the protracted isolation the State has lived through, for long periods of its history and the economic and educational lag it still suffers." This safeguard of State subjects is also being eroded through some indirect methods, which during last 60 years the opposition leaders have pointed out.

CHAPTER IV

FEATURES OF THE CONSTITUTION

The constitution of Jammu and Kashmir is a constitution within the Indian constitution. The political system of Jammu and Kashmir is a sub-system with a sub-constitutional system. Jammu and Kashmir is the only state in India which has its own constitution. This constitution is the creation of the Indian Constitutional instruments. It is the creation of the instrument of accession read through Article 370 of the Indian constitution. The title of the constitution as provided by the constitution itself is "constitution of Jammu and Kashmir." Its sections 2,3,4,5,6,7,8 and 158 were enforced immediately after its adoption. However, the provisions of this constitution were applicable to the state on the 26th day of January, 1957.

The constitution has a preamble. It declares the objects and the aims of the constitution. It says that the people of the state of Jammu and Kashmir have solemnly resolved, in pursuance of the accession of the State to India, to define the existing relationship as an integral part of India. It promises to secure to the people social, economic and political justice. It ensures to the people the liberty of thought, expression, belief, faith and worship. It envisages for the people the

equality of status and of opportunity. It desires to promote among the people a fraternity assuring the dignity of the individual and the unity of the nation.

One of the features of the constitutions is to define the relationship of the state with the union of India. It declares Kashmir as an integral part of the Union of India. According to it the State shall comprise all the territories which on the 15th day of August 1957 were under the sovereignty or suzerainty of the ruler of the State. It ensures the executive and legislative power of the State to extend to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the constitution of India.

The constitution of Jammu and Kashmir has a distinctive feature of declaring citizens of the State as permanent residents or state subjects. It declares any person who, before the 14th of May 1954 was a State subject of class first or of class second and who having migrated after the first day of March 1947 to the territory included in Pakistan and on his return to the State under a permit of resettlement in the State or for permanent return issued by or under the authority of any law made by the state legislature shall on such return be a permanent resident of the state. This is the feature which no other Indian citizen enjoys. This provision of the constitution was first agreed to by the Delhi Agreement of 1952. The State legislature is empowered to define, regulate and declare the State subjects.

The constitution includes a chapter on Directive principles of State policy. The part IV of the constitution defines these principles and declares that these principles shall not be enforcible by any court of law but the principles there in laid down are nevertheless fundamental in the governance of the State. It declares that the Government of Jammu and Kashmir State shall strive to establish a socialist order of society for the promotion of welfare of the people. It instructs

the state to develop its economy, in a planned manner as to enrich the material and cultural life of the people. It directs the State to ensure speedy improvement in standard of living of rural masses and organize village panchayats. It makes the ruler conscious of taking certain steps for promoting crafts and cottage industries. It directed the State separation of judiciary from executive which was accomplished during Mr. Sadiq's regime. It promises to the people by directing the government to make laws by which right to work is ensured in certain cases and free and compulsory education for all. It instructs the government to strive to secure rights of children and rights of women and protection of educational, material and cultural interests of socially and economically backward sections. It directs the state to perform the duties as to improve public health and foster equality and secularism.

The constitution has a distinction of a parliamentary system of government. The state is divided into 76 constituencies and each constituency returns a single member to the State legislative assembly. Actually the State legislative assembly is to consist of one hundred members chosen by direct election. However, 25 seats in the legislative assembly remain vacant for the people of the area of the State under the occupation of Pakistan. The legislature is elected on the basis of party system and the leader of the majority party is invited by the Governor to form the government and is appointed as the Chief Minister of the State. The Council of Ministers is recommended by the Chief Minister and appointed by the Governor of the State.

The Constitution provides a bicameral legislature. The lower house is named as the Legislative Assembly and the upper house as the Legislative Council of the State. The legislative assembly consists of one hundred members chosen by direct elections from territorial constituencies in the State. Legislative Council, on the other hand, consists of only 36

members. The members of the legislative assembly elect eleven members from Kashmir province and eleven members from Jammu; provided that members so elected are not members of the Legislative Assembly. Further, members elected from Kashmir province are so elected that at least one is resident of District Leh and one is resident of District Kargil. Similarly, members elected from Jammu should include at least one from District Poonch and one from District Doda. The members of Municipal Council, Town Area Committees, and Notified Area Committees from Kashmir and Jammu have a right to elect one member from each province. The members of the Panchayats and such other local bodies in the province of Kashmir and Jammu as the Governor may by order specify, have a right to elect two members from each province. The Governor has a power to nominate to the Council eight members; three of them are persons belonging to any of the socially or economically backward classes in the State; other five members are persons having special knowledge or practical experience in respect of matters such as literature, science, art, cooperative movement and social service. The elections to the first category of the members are held in accordance with the system of proportional representation by means of single transferable vote. The constitution is partly rigid and partly flexible. The constitution amendment procedure is provided by the constitution. An amendment can be initiated by the introduction of a bill for the purpose, in the legislative assembly and when the bill is passed in each house by a majority of not less than two thirds of the total membership of that house it is presented to the Governor for his assent. Once the assent to the bill is given the constitution stands amended in accordance with the terms of the bill. However, in case of a bill for the abolition of the legislative council, a majority of the total membership of the Assembly and by a majority of not less than two thirds of the members of the Assembly present and voting, is required. The constitution becomes rigid because

it cannot amend provisions of section 3, 5, and 147. It cannot also amend the provisions of the constitution of India as applicable in relation to the State.

The constitution is written and enacted. It consists of 158 sections and 6 schedules. It has uptil 2002 undergone 45 amendments. In its appendix state subject definition and the constitution of India (as applicable to Jammu And Kashmir State) are attached.

The constitution is secular in nature and secular in its spirit. In the very preamble of the constitution it declares freedom of belief, faith and worship, to the people of the State of Jammu and Kashmir. It also declares eligibility of every adult in the electoral roll without denying it on ground of religion, race and sex. It declares every public office open to every citizen without having discrimination on the basis of belief, religion, cast, creed or race.

The constitution of Jammu and Kashmir is a miniature Indian constitution. It provides a Governor with powers but without exercising them. He has to act on the advice of Council of Ministers. The legislature is bicameral consisting of legislative Assembly and legislative Council. The upper house is an elderly house which works as a check over the hasty decisions of the lower house. The state judiciary is independent by itself within the territorial jurisdiction of the State of Jammu and Kashmir. Thus, the set of Central Government is visible at the state level.

The constitution of Jammu and Kashmir has peculiarity of enjoying the executive and legislative powers to the extent of making laws on all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the constitution of India. Under the constitution of India, the most distinct feature that gives a slightly different shape to the legislative relations between the State of J&K and that of the Central Government, is that the residuary subjects are reserved for the Gov-

ernment of the State. The constitution also enjoys the residuary powers of taxation in the State of J&K.

The constitution does not define citizenship but relates provisions to state-subjects. However, it says that every such person who is or is deemed to be a state subject under the provisions of the constitution of J&K shall be a citizen of India. At the same time it declares permanent residents of the State to enjoy all the rights guaranteed to them under the constitution of India. This means that all state-subjects are Indian citizens but all citizens of India, outside the State of J&K, are not the state-subjects. This is detestable section of the constitution, according to those people who demand full accession or full merger of the State with India.

Our constitution has another peculiarity of declaring a particular flag under section 144 to be the flag of the State. It is rectangular in shape and red in colour with three equidistant white vertical stripes of equal width next to the staff and a white plough in the middle with the handle facing the stripes. The ratio of the length of the flag to its width is 3:2. However, the flag is hoisted along with the Indian National flag on official distinctive places. The state flag was recognized by Central leadership under Delhi agreement of 1952.

The last but not the least distinctive feature of the constitution is the creation of academy for the development of Art, Culture and Languages. The same Academy was established in 1963 under the provisions of section 146 of the constitution. The Academy is an autonomous corporate body-its administrative head being a Secretary who may sue and be sued. It coordinates the activities of the district, regional and other organizations within the State for cultural purposes. It has to cooperate with similar union and state academics in furtherance of its objectives. It encourages the exchange of ideas and enrichment of techniques between the different regions of the state, between the state and the other states of India, in the field of activity relating to the objects

of the academy and, for this purpose to sponsor or organize cultural exchanges, mushairas, symposiums, seminars, lectures, meets, camps, conferences, exhibitions, film show, music, dance and drama performances, and cultural festivals etc, on regional, all-state or all-India basis. Its object is also to promote cooperation amongst men of letters, artists, art, literary and cultural associates, and to encourage, whenever necessary, the establishment and development of such associations, art and cultural centres, including theatre centre, studios, and clubs for the development of literature, art and culture in the State.

The basic feature of the constitution is the identification of the State of J&K as a separate entity though the accession is irrevocable. Kashmir leadership ill affords, at least in the valley to raise a slogan of abrogation of Article 370 or merger of the state with the union of India. Even Bakshi Ghulam Mohammad once asserted before his fall from power that article 370 would be abrogated on his dead body. In an interview with Kashmir post he said, "We prefer to be poor but independent rather than rich and under other's control." During Mr. Sadiq's time article 370 was mostly eroded but Mir Qasim's resistance had a different slant. He left power to Sheikh Mohammad Abdullah who he (Qasim) thought had far better quality of resisting owing to his charisma. Mr. Mir Qasim never sided Central leadership either against the Sheikh or the National Conference. And the Sheikh was, as A.N. Dar asserts, Article 370 in flesh and blood. Consequently, the constitution of J&K has become a guarantee to its self-identification.

CHAPTER V

DIRECTIVE PRINCIPLES OF STATE POLICY AND FUNDAMENTAL RIGHTS

The constitution of J&K, includes in itself Directive Principles of State policy in a manner, style and content that of the Indian constitution. These principles in the Indian constitution are declared fundamental in the governance of the country. These Directive Principles are intended to lay down in general terms the objects which the framers of the constitution had desired. They are in nature affirmative instructions to governments to direct their activities to do certain things and thereby promote the realization of the high ideals set forth in the preamble to the constitution. The idea of making such social and economic declarations is the recognition of the ideal of the state as a welfare state. These principles in Indian constitution originated with the Weimar constitution of Germany. However, Indian constitution follows the example of Ireland where as Irish themselves borrowed the idea from the constitution of the Republic of Spain. It is Irish people who distinguished justiciable rights of the individual from the non-justiciable social policy. The constitution of Jammu and Kashmir borrowed it from the Indian constitution and almost verbatim.

The constitution of Jammu and Kashmir includs in part

IV these Directive Principles of State policy and fortunately the same principles are included in part IV of the Indian constitution. The constitution in part IV section 11 defines the government of the state of Jammu and Kashmir. It says that the state includes the government and legislature of the state and all local or other authorities within the territory of the state or under the control of the government of the state. In section 12 of constitution it is declared that this part is not enforceable by any court of law. But, however, it claims that these principles lay down therein, are nevertheless fundamental in the governance of the state. It directs the state to apply these principles in making of laws.

The first principle that becomes a guide-line for the State is to establish a socialist pattern of society for the promotion of the welfare of the people. It says that the prime object of the State lies in the ideals and objectives of 'Naya Kashmir'. This 'Naya Kashmir' was the future constitution drafted by the National Conference in 1944. It had included all ideals and objectives of the freedom movement by the National Conference and its leadership between 1931 - 1947. According to it the governments must promote the welfare of the mass of the people by establishing and preserving a socialist pattern of society. Consequently, it desired a socialist order where in all exploitation of man is abolished and justice social, economic and political is achieved. It directs all concerned to establish socialist order by informing all the institutions of National life.

In order to establish such a socialist order the section 14 of the constitution desires the State to develop its economy in a planned manner. It directs them to plan productive forces of the country with a view to enrich the material and cultural life of the people and foster and protect:-

1. the public sector where the means of production are owned by the State;

2. the co-operative sector where the means of production are co-operatively owned by individuals or groups of individuals; and

3. The private sector where the means of production are owned by an individual or a corporation employing labour; provided that the operation of the sector is not allowed to result in the concentration of wealth or of the means of production to the common detriment.

To further the socialist order of society section 15 of the constitution directs the State to ensure speedy improvement in standard of living of rural masses. It instructs the State to endeavour to organize and develop agriculture and animal husbandry by bringing to the aid of the cultivator the benefits of modern and scientific research and techniques so as to ensure a speedy improvement in the standard of living as also the prosperity of the rural masses.

To establish and improve better economic conditions the constitution advises the governments to take certain steps for promoting crafts and cottage industries of the state by initiating new programmes. It is advised to execute well considered programmes for refining and modernizing techniques and modes of their production. To eliminate unnecessary drudgery and toil of the workers the state is directed to produce cheap power. The state must enhance the artistic value of the products while the fullest scope is provided for the encouragement and development of individual talent and initiative.

To train the people for a democratic set up the chapter IV section 16 directs the State to take steps to organize village Panchayats. It envisages Panchayats to function as a democratic forum in the villages. It instructs the State to endow these Panchayats with such powers and authority as may be necessary to enable them to function as units of self government.

The Directive Principles envisage that the State shall

separate judiciary from executive. It lays down that the State must take steps to provide such a judicial system which is human, cheap, certain, objective and impartial. The judiciary must ensure efficiency, impartiality and incorruptibility. It is worth noting that judiciary in the State was separated from the executive during Mr. Sadiq's Chief Ministership.

The constitution further directs the State within her limits of its economic capacity and development, make effective provision for securing:-

(a) That all permanent residents, men and women equally, have the right to work, that is, the right to receive guaranteed work with payment for labour in accordance with its quantity and quality subject to a basic minimum and maximum wage established by law.

(b) That the health and strength of workers, men and women and the tender- age of children are not abused and that permanent residents are not forced by economic necessity to enter avocations unsuited to their sex, age or strength;

(c) That all workers, agricultural, industrial or otherwise, have reasonable, just and humane conditions of work with full enjoyment of leisure and social and cultural opportunities;

(d) That all permanent residents have adequate maintenance in old age as well as in the event of sickness, disablement, unemployment and other cases of undeserved want by providing social insurance, medical aid, hospitals, sanatoria and health resorts at state expense.

Education is a process where by good citizens can be sought. Consequently the Directive Principles of the State policy instruct the State of Jammu and Kashmir to seek free and compulsory education in certain cases and to endeavour:-

(a) To secure to every permanent resident the right to free education up to the University standard (this right to education in the state continues to persist unlike all other Indian states);

(b) To provide, within a period of ten years from the commencement of this constitution, compulsory education for all children until they complete the age of 14 years; and

(c) To ensure to all workers and employees adequate facilities for adult education and part time technical, professional and vocational courses.

The constitution under section 21 and 22 directs the state to strive to secure happy childhood and proper protection of children and to secure the rights of women. Section 21 instructs the state to strive to secure to all children right to happy childhood with adequate medical care and attention. It advises the state to secure to all children and youth equal opportunities in education and employment, protection against exploitation and against moral or material abandonment. For women the state is directed to secure to them the right to equal pay for equal work. It orders the state to secure to them the right to maternity benefits as well as adequate medical care in all employments. It advises the state to secure to the women the right to reasonable maintenance, extending to cases of married women who have been divorced or abandoned. It instructs the state to secure to them the right to full equality in all social, educational, political and legal matters. The constitution advises the state to strive to secure for women special protection against discourtesy, defamation, hooliganism and other forms of misconduct.

Further the constitution in its part IV section 23 directs the state to guarantee to the socially and educationally backward sections of the people special care in the promotion of their educational, material and cultural interests and protection against social injustice. In its section 24 the state is directed to make every effort to safeguard and promote the health of the people. According to these principles it can be

achieved by advancing public hygiene and by prevention of disease through sanitation, pest-control, propaganda and other measures. It can be achieved by ensuring wide spread, efficient and free medical service throughout the state. Finally, section 25 of this part considers it duty of the state to foster equality and secularism. According to it, it can be achieved by combating ignorance, superstition, fanaticism, communalism, racialism, and cultural backwardness. The state is directed to seek to foster brotherhood and equality among all communities under the aegis of a secular state.

As stated earlier the object of incorporating these principles was to direct the state to act in a manner that could convert the state of Jammu and Kashmir into a welfare state. The objective so far may not have been realized in toto, but assuredly many objectives have been realized. For example, free education up to the University standard is available only in this state in the whole of India. Women in the state receive equal pay equal work and enjoy equality in all their social, educational and political life of the state. However, these instructions and directions are not justiciable. No state subject can move a court of law for these principles. Thus, what is true of the Directive Principles under the Indian constitution, is, true of these principles under the constitution of Jammu and Kashmir. They are considered nothing more than a political manifesto. Nasiruddin described these principles of Indian constitution as a set of new year resolutions. The same may be true of the principles enshrined in J&K constitution. Interestingly, Professor K.T. Shah likened them to a cheque on the bank payable at the convenience of the bank. To put it rightly the principles enshrined in J&K constitution are a cheque payable at the convenience of J & K Bank. To Dr. K.C. Whear, Oxford Professor, these principles are "a little more than a manifesto of aims and aspirations." To Kashmiris these principles in the constitution are the same aspirations and aims as visualized by N.C. leadership through their document of 'Naya Kashmir.' During our constitutional history since the adoption of the constitution these principles were many a time flouted. Had these principles been acted upon honestly the dream of 'Naya Kashmir' would have been realized.

FUNDAMENTAL RIGHTS

In our initial constitution the Fundamental Rights were not incorporated. In principle, however, the application of Fundamental Rights was recognized under Nehru-Abdullah Agreement or what is known as Delhi Agreement made on 24th July 1952. However, it was agreed that these Fundamental Rights shall be applicable to the State of Jammu and Kashmir subject to certain modifications. In the Agreement while giving an example it was conceded that the decision of the state not to award compensation to dispossessed landlords would be accepted contrary to the right to property under the Fundamental Rights of the constitution of India. However, section 10 of the constitution of the state of Jammu & Kashmir provides that the permanent residents of the state shall have all the rights guaranteed to them under the constitution of India. Consequently, part III of the Indian constitution dealing with Fundamental Rights was applied to the State of Jammu and Kashmir in 1954. This application was subject to certain modifications and exceptions. This order (C.O. 48 of 1954) came into force on the 14th day of May 1954. This order defines the State to include the government and the legislature of each of the States and all other local authorities within the territory of Indian or under the control of the government of India. The Fundamental Rights (as applicable in relation to the State of Jammu & Kashmir) on the commencement and enforcement in the State declared all laws invalid which were inconsistent with the provisions of these rights before order of 1954. It further defined the law and declared it to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having

in the territory of India the force of law. Further, the Fundamental Rights (as applicable in relation to the state of Jammu and Kashmir) are discussed in the pages ahead. Article 14 of the Indian constitution is applicable to the state subjects which deal with right to equality. It lays down that the state of J & K shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This equality is ensured under Article 15 of the Indian constitution as applied to the state by which the state is prohibited to discriminate between state subjects on ground of religion, race, caste, sex or place of birth shall be rendered disable or restricted or shall have liability with regard to:

(a) excess to shops, public restaurants, hotels and place of public entertainment or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public. This, however, does not limit the state from making any special provision for women and children.

The Indian constitution Articles 16, 17 and 18 deal with three important rights for the state subjects. The first grants them equality of opportunity in matters of public employment or appointment to any office under the state. It lays down that no state subject shall be ineligible for any employment or office under the state. However, this does not limit the power of the state from making any provision for the reservation of appointment or post in favour of any backward class of permanent residents of the state. Further, Article 17 and 18 abolish untouchability and titles- the state forbids untouchability in any form and no military and academic distinction is conferred by the state.

Article 19 of the Indian constitution is one of the important Fundamental Rights guaranteed to the state subjects or to the Indian citizens. It deals with the right to freedom. It protects certain rights regarding freedom of speech which

are as follow:-

(a) right to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations and unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practice any profession, or to carry on any occupation, trade or business.

These freedoms are not unlimited but reasonable restrictions on the exercise of these rights are imposed in the interests of the sovereignty, integrity of India and the security of the state.

The constitution (as applicable in relation to state of Jammu and Kashmir) under Article 20 provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It lays down that no person shall be prosecuted and punished for the same offence more than once and no person accused of any offence shall be compelled to be a witness against himself. Articles 21 and 22 declare that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 provides that no person who is arrested shall be detained in custody without being informed as soon as may be, of the ground for such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice. Such persons shall be produced before the nearest magistrate within a period of 24 hours. However, the provisions of Article 22 are limited to

such a person who is arrested or detained under any law providing for preventive detention.

The constitution guarantees rights against exploitation as well. It lays down that the traffic in human beings and "beggar"(exploitation) and other similar forms of forced labour are prohibited and its violation shall be an offence punishable in accordance with law. However nothing prevents the state from imposing compulsory service for public purposes. Article 24 declares that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

The constitution recognizes right to freedom of religion also as a basic or fundamental right. It lays down that subject to public order, morality and health of all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. However, the state is not prohibited from regulating, or restricting any economic, financial, political or other secular activity which may be associated with religious practice. The state also is not limited to make law providing for social welfare and reform or throwing open of Hindu religious institution of a public character to all classes and sections of Hindus. Related to this provision is article 26 which provides freedom to manage religious affairs subject to public order, morality and health, every religious denomination having the right:-

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

However, the Article 27 and 28 provide every citizen a freedom as to payment of taxes for promotion of any particular religion. At the same time no religious instruction

shall be provided in any educational institution wholly maintained out of state funds.

The constitution of India admits a state subject like any other Indian citizen to the cultural and educational rights. It protects the interests of minorities and cultural entities. It lays down that any section of the citizens residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same. Such minorities have a right to establish and administer educational institution of their choice, whether based on religion or language. At the same time the state shall not in granting aid to such institutions discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

The constitution of India under Article 31 and 31-B guarantees to its people the right to property. It lays down that no person shall be deprived of his property save by authority of law. It also provides that no property shall be compulsorily acquired or requisitioned save for a public purpose under the authority of law which means compensation to be paid for such a property. Article 31-A provides the rights of the state for the acquisition of estates. According to it no law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights, conferred by Article 14, Article 19 or Article 31. The conditions as such are:-

(a) the acquisition by the state of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the state for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or license. However, Article 31-B validates certain acts and regulations specified in the 9th schedule. Such acts are declared valid under this Article. This provision as a matter of fact relates to section 6 of the Delhi Agreement 1952 which has decided to accept the abolition act of landlordism in Kashmir without granting compensation to dispossessed landlords.

Finally, the constitution (as applicable in relation to the state) provides constitutional remedies under Article 32, 33, 34, and 35 to the state subjects whereby these rights become justiciable. This part gives a right to a state subject to move Supreme Court by appropriate proceedings for the enforcement of these rights conferred by part III. Supreme Court has a power to issue directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari. However, under Article 33 Parliament has power to determine to what extent any of these rights are applicable to the members of the armed forces or other forces which are charged to maintain public order. Further, this power is curtailed or restricted by the Parliament in case martial law is in force in any area. Article 35-A which was latter added excludes such existing laws in force in the state of Jammu and Kashmir or law hereafter enacted by the legislature of the state pertaining to:-

(a) defining the classes of persons who are, or shall be, permanent residents of the state of Jammu & Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects:-

i) employment under the state government ;

ii) acquisition of immovable property in the state;

iii) settlement in the state; or

iv) right to scholarships and such other forms of aid as the state government may provide

Consequently, the laws pertaining at items (a) and (b) shall not be void on the ground that it is in consistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this part. It is under this Article 35-A that non-state subjects are debarred from entering into local service or in accruing land or any other immovable property within the state of J & K. It is against this safeguard of the people of Kashmir that most of the intellectuals and leaders of India including people from Jammu clamour and demand full merger of the state with the Union of India.

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CHAPTER VI

THE STATE EXECUTIVE

History of Kashmir is the history of kings some benevolent and some tyrant, consequently, since Kashap colonised Kashmir the head of the executive remained always a king. The king enjoyed all the executive, legislative and judicial powers. Undoubtedly, monarch like Latiditya (697-73 A.D.) is adjudged to be the best and most renowned. The Kashmiris held him in great esteem even after his death and celebrated a day in the valley to commemorate the deeds of the hero. He ruled by consent and advice. After the decline of Hindu rule in Kashmir Muslims captured the power and assuredly Zain-ul-Abidin endearingly called Budshah was a benevolent king. Even today a Kashmiri peasent and worker toiling in the fields, on the roads and elsewhere sings his name "Budshah Padshah." He ruled with concensus of the elite but in the interest of the people. After the Sultanate, Chaks, Mughals, Afghans and Sikhs ruled Kashmir uptil 1846. By the end of Sikh rule in 1846 when the Dogra Rajputs got the valley under the defamed treaty of Amritsar the kingship followed under Dogra Rajputs till 1947. Except during Ranbir Singh's brief time from 1872-77, a collegiate executive existed otherwise single executive head continued till the Maharaja Hari Singh's rule was over. When in July 1950 the

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Maharaja delegated his powers to his son Yuvaraj Karan Singh and left the state, a constitutional change occurred which changed hereditary head of the executive to an elective one. Dr. Karan Singh in April 1951 by a proclamation ordered the convening of a constituent Assembly. The Assembly was inaugurated in October 1951. on 20th Nov. 1951 the Assembly amended the constitution Act of 1939 and stripped the Maharaja most of his powers. Under the amended Act the legislative powers were made by or in accordance with a law made by the constituent Assembly. The executive powers which continued to remain with the Yuvaraj were to be exercised by him on the aid and advice of a Council of Ministers. The Maharaja was, thus, reduced to the position of a nominal head. Later the constituent Assembly recommended the abolition of kingship in the State and proposed the replacement of the Maharaja by an elected head of the State. Thus, Dr. Karan Singh was recommended as head of the State by the assembly and recognized by the President of the Indian union to be the first and last elected head of the state of Jammu and Kashmir. The name given to the head of the state was Sadar-i-Riyasat and ordinarily his term of office was five years. He was to exercise such powers and perform such functions as had to be prescribed in the constitution for which the assembly was elected til such constitution was framed by the constituent Assembly, Sadar-i-Riyasat was to exercise such powers as were vested in the Maharaja under the constitution of 1939 as amended by the constitution Act of 1951. Dr. Karan Singh was the first Sadar-i-Riyasat after the abolition of Dogra rule and first to remain in office beyond five years term. Consequently, the initial constitution gave the head of the state the title of Sadar-i-Riyasat and made the office elective. Later under the sixth amendment Act of 1965 the nomenclature was changed to governor and the office was declared to be appointee of the President of India.

Part V of the Jammu and Kashmir constitution deals with the provisions relating to the executive in the state. It provides that the head of the State shall be the Governor who shall be appointed by the President of India by warrant under his hand and seal. The Governor in his capacity as head of the state shall exercise the executive powers either directly or through officers subordinate to him in accordance with the provisions of the constitution of Jammu and Kashmir. This power is not prejudicial to transfer to the Governor any functions conferred by any existing law on any other authority or prevent the state legislature from conferring by law functions on any authority subordinate to the Governors.

The governor holds office during the pleasure of the President. Dr. Karan Singh, acted as the first Sadar-i-Riyasat uptil the constitution of Jammu and Kashmir sixth amendment Act 1965, and on his entry into politics, Mr. Bhagwan Sahay was appointed the Governor of the state by warrant under his hand and seal by the President of India. He was the first non-state subject appointed to the office of the head of the state as envisaged by the constitution of India. Under the Indian constitutional framework a Governor should not belong to the state to which he is appointed. Mr. Bhagwan Sahay was succeeded by Mr. L. K. Jha as Governor of the State and Mr. B. K. Nehru succeeded MR. L. K. Jha. The governor has the right to resign from his office under his hand addressed to the President. Usually the Governor holds office for five years but the term is extendable. Mr. L. K. Jha enjoyed such an extended period. The constitution provides that the governor holds his office until the successor enters upon it. No person is eligible for appointment to the office unless he is a citizen of India and has completed the age of thirty years. The Governor is not a member of either house of the State Legislature, and if he be, he is deemed to have vacated his seat in the house on the date on which he enters

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upon his office as Governor; (this part has no relevance to the office since the governor should be non-state subject). The Governor cannot hold any other office of profit. He is entitled to such emoluments allowances and privileges as are specified in the second schedule. The emoluments of the governor are Rs. 5500 per mensem. His maximum allowances total at Rs. 2,35,000/. In addition he is entitled without payment of rent or hire to the use of his furnished official residence and motor vehicles including two motor cars, one jeep, two station vegans and one motor cycle and their maintenance. The emoluments in his favour are not diminishable during his term of office.

Before entering upon his office, Governor, and every person discharging the functions of the Governor has to make or subscribe in the presence of the Chief Justice of the High Court or in his absence, the senior most judge of the high court, an oath or affirmation according to the form prescribed by the constitution. The form is as under:-

I do swear in the name of God or solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of Jammu and Kashmir and will to the best of my ability preserve, protect and defend the constitution and the law that I will devote myself to the service and well being of the people of the state.

The President of India has the power to make such provisions as he thinks fit for the discharge of functions of Governor in any contingency not provided for in part V of the constitution.

The Governor is not answerable to any court for the exercise and performance of the powers and duties of his office or for any act done by him in the exercise and performance of those powers and duties. No criminal proceedings can be instituted or continued against the Governor of the state in any court during his term of office. Nor shall any

process for the arrest or imprisonment of the Governor be issued from any Court during during his term of office. No civil proceedings shall be instituted against the Governor in any court in respect of any act done in his personal capacity, during his term of office, until the expiration of two months after a notice in writing has been delivered to him starting the nature of the proceedings, the cause of action, the name of the party intending to use him, and the relief claimed.

The executive power of the state vested in the Governor is exercised by him with the 'aid and advice' of a Council of Minister but he may if need be under the constitution of India require to exercise his functions or any of them in his discretion. The validity of anything done by the Governor in his discretion cannot be called in question on the ground that he ought or ought not to have acted in his discretion. The constitution further lays down that the Chief Minister should be appointed by the Governor and that other ministers should be appointed by him on the advice of the Chief Minister and that the Ministers should hold office during pleasure of the Governor-it again leaves discretion in the hands of the Governor.

The constitution makes the Governor a part of the State legislature and it assigns him some role in its composition. He has the power to nominate some members to the legislative council, and further, if in his opinion some community is not adequately represented, he has right to do so. In addition eight members are nominated to the legislative council by the Governor not more than three of whom are persons belonging to any of the socially or economically backward classes in the state and the others shall be persons having special knowledge or practical experience in respect of matters such as literature, science, art, cooperative movement and social service. Whenever the office of the speaker of the Assembly is vacant, the Deputy Speaker performs the duties of that office, but if the office of the Deputy Speaker is

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also vacant the Governor is empowered to appoint any member of the Assembly to perform those functions. Similarly, if the office of both the Chairman and deputy Chairman of the legislative council is vacant at any time and for any reason the Governor is empowered to appoint any member of the council to perform the functions of that office. Unless the legislature makes by law rules in respect of the recruitment to the secretariat staff of the Assembly or the council the Governor is empowered to make such appointments or its rules after consulting Speaker or the chairman. Governor has a power and an important role in the functioning of the State legislature. The constitution lays down that the governor should from time to time summon the House of each House of the state legislature to meet at such a time and place as he thought fit. However, he should see to it that six months elapse between its last sitting in one session and the date appointed for its first sitting in the next session. He has a power to prorogue the House or either House and dissolve the Legislative Assembly. At the commencement of the first session after each general election and at the commencement of the first session of each year the Governor has a right to address the Legislative Assembly or, in case of bicameral legislature, both houses. He can send messages to the House or Houses with respect to a bill pending in the legislature or otherwise and a House to which such a message is sent, is obliged to consider that message at its earliest convenience. The Governor is an important part of the legislative procedure in a State. All bills once passed by the Assembly or by a bicameral legislature according to the procedure laid down in the constitution the bill is sent to the Governor for assent. The Governor has four courses left for his choice: (i) he might give his assent to the bill; he might withhold assent; (iii) he might reserve the bill for the consideration of the President, and; (iv) he might return the bill to the House provided that it was not a money-bill. In case a bill is returned to the House or Houses for reconsideration

the legislature has an option. Either it is re-passed with or without amendment and returned to the Governor for assent, or reserve the bill for the sanction of the President. In the year 1982 the resettlement bill was returned to the legislature but when it was passed again the Governor referred it to the President who forwarded it to the Supreme Court for an advice. The Governor is not empowered to withhold his assent to a bill that is certified by the Speaker of the Assembly as a money bill and a money bill is defined in the constitution. The governor causes to be laid before the legislature in respect of every financial year the annual financial statement usually known as Budget. No demand for grant is made on the recommendation of the Governor and no money bill is introduced except on his recommendation.

The Governor of the State enjoys some powers of legislative nature. For example, when the legislature of the state is not in session and the Governor felt that immediate action was necessary he could issue ordinance as the situation demanded. Such an ordinance has the same force as the law or an Act of the legislature. However, the ordinance is to be laid before the legislature for approval and it can cease to operate at the expiration of six weeks from re-assembly of the legislature. The ordinance can be withdrawn by the Governor at any time. He cannot, however, promulgate any such ordinance which includes the provisions that requires previous sanction of the President for the introduction thereof into the legislature. Actually, Governor is an ordinance from the governed by the principle of legislation provided in concurrent list. If State legislature and the Parliament of India make a law on a subject provided in concurrent list the conflict results into the supremacy of Parliament, or if any such law had been reserved for the consideration of the President and had received his assent that law prevailed in that state.

The Governor is vested with some powers of a judicial

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nature. It provides that the governor has power to grant pardons, reprieves or remissions of punishment or to suspend, remit, or commute the sentence of any person convicted of an offence against any law relating to a matter to which the executive power of the state extended.

In addition to appointing the Chief Minister and on his advice appointing other ministers, the Governor appoints a person who is qualified to be appointed a judge of a High Court to be the Advocate-general of the State. The Advocate-general is to advise the State government upon legal matters. He also performed such other duties of a legal character as were assigned to him by the Governor from time to time. He holds his office during the pleasure of the Governor and receives such remuneration as the Governor fixed The Governor also appoints the Chairman and other members of the State Public Service Commission. He determines the member of the Commission and their conditions of service and makes provision with respect to the number of staff of the Commission and their conditions of service.

The Governor of the state both according to the Jammu & Kashmir constitution and the Indian constitution enjoys above mentioned executive, legislative and judicial powers. However, the Governor in the Indian constitution framework is a controversial office which according to some is a nominal figure and to some is an agent of the President of India. The Governor of the state of Jammu & Kashmir is in no way different than the Governor of any other state in India. Both constitutionally and politically the Governor of the state of Jammu and Kashmir is more important than any other Governor in India. It is because of two reasons. The J&K state is the most sensitive area on account of its political and strategic history since 1947. Further, constitutionally the Governor is to take oath under the constitution of Jammu and Kashmir. The three important Governors appointed for the state of Jammu and Kashmir after the Sadar-

i-Riyasat are Mr. Baghwan Sahay, Mr. L. K. Jha and Sh. B. K. Nehru. Mr. Baghwan Sahay though faithful to the President of India, acted like a proletarian and tried to win over as many people in Kashmir as could be possible for him. However, no constitutional crises whatsoever were witnessed during his tenure of office. Mr. L. K. Jha though acted as a bureaucrat yet proved to be a statesman. He was instrumental in bringing out the accord and he alone had the capacity to work with the 'tallest of the Kashmiris' - Sheikh Mohammad Abdullah. During his time the Governor's Rule was promulgated on the advice of the Chief Minister and fresh elections were held. During the elections he was the man who administered the state well without breaking with the Sheikh. Under the constitutional (as applicable in relation to the state of Jammu and Kashmir) the President of India could proclaim Presidential rule in the state as it is done in other States. But the claim of the Kashmiris of having a separate identity leaves the Indian leadership cautious towards Kashmir - hence L. K. Jha promulgated Governor's rule rather recommending Presidential rule. The Governor for the state is usually eminent personality leaves no doubt in his capacity to reign like the British Queen without creating any problems. The state of Jammu and Kashmir had no experience of an inexperienced Governor. Mr. B. K. Nehru had to resort to his discretion when the Resettlement Bill was sent for his assent but he managed to come out of it without damage to his office. In Kashmir Governor is more than a mere agent of the President of India. He is a ruler in content and essence. He is a laison or a bridge between the Muslim culture and a vast Hindu culture to dissolve into a secular culture. To what extent this agent of the President fulfills such an objective is a question for futurology. It is, however, regrettable that none of the heads of the state uptil Mr. L. K. Jha, could create consensus in the central leadership and administration for the conduct of fair elections uptil 1977. During Sheikh Sahib's term of office, B. K. Nehru

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worked well with the Chief Minister. However, B. K. Nehru, the Governor of J & K, was followed by Shri Jagmohan, Gen. K. V. Krishna Rao and Shri G. N. Saxena but last three luminaries put in two terms each in office.

The constitution provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions except when the Governor acts under constitution in his discretion. The constitution does not define the discretionary powers of the Governor. The Governor appoints the Chief Minister, and other ministers are appointed by the Governor on the advice of the Chief Minister. While the Council of Ministers is collectively responsible to the legislative Assembly of the state, ministers hold office during the pleasure of the Governor. However, the pleasure of the governor means pleasure of the Chief Minister. When a Minister does not agree to the policy of the Council of Ministers the constitutional propriety demands that he should immediately resign when a hint is given by the Chief Minister. If he does not resign then it is the right of the Chief Minister to advise the Governor his dismissal. The ministry is always one and indivisible and its solidarity demands a common front both within and outside the legislature. Even if a Minister disagrees with a decision of the cabinet, which is the inner cell of the Council of Ministers, he should not disclose the points of deference and for that matter all cabinet secrets must be most sçrupulously guarded. Dr. Karan Singh asserts in his book "Heir Apparent" that Sheik Sahib's fall in 1953 was caused by the difference between the Sheikh and some of his Cabinet Ministers like Sham Lal Saraf, D. P. Dhar Bakhshi Sahib and others. The number of Ministers is not fixed by the Constitution. It is for the Chief Minister to determine the size of the Council of Ministers as he does so as the requirements and the occasion may demand. A precedence in the State is that a person from Ladakh gets a Ministership and Jammu

province is duly represented. However, there have been a large number of Council of Ministers sometime and a compact and small ministry at the other time. Sheikh Abdullah's last ministry was big one. The responsible government demands that all departments must be presided over by a political chief so that a policy is implemented for which the ministers are answerable to the legislature. Before a minister enters upon his office the Governor administers to him the oath of office and secrecy according to the prescribed form. A minister must be a member of one or the other House of the State legislature. If he is not he ceases to be a minister after the expiry of six months. The salaries and allowances of ministers are to be such as the state legislature may determine by law. The question whether any, and if so what, advice was tendered by ministers to the Governor cannot be inquired into by any court. This naturally establishes that the relations between the Governor and his ministers are confidential. There is no word cabinet in the constitution but it only provides for a Council of Ministers. The cabinet has an extra constitutional growth. This is just by way of precedence but ministers have been categorised in terms of cabinet, Deputy, State or even Deputy Chief Minister. But it is the Cabinet Ministers alone who meet in a body and formulate a policy. The cabinet ministers preside over the different departments of the government and see that the policy is properly implemented. If a Minister of state holds an independent charge of a department he attends the meetings of the Cabinet and takes part in its discussion. Deputy Ministers and Parliamentary Secretaries have no place in the Cabinet. The Deputy Ministers have no charge of a separate department and receive lesser salary than the Cabinet Ministers and Ministers of State. The Parliamentary Secretaries are neither ministers nor do they exercise any powers. But all of them are the members of the Council of Ministers and are members of the State legislature. They belong to the majority party of the legislative Assembly and are collectively

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responsible to it. They remain in office so long as they can retain the confidence of the legislative Assembly. The dismissal of a ministry by the head of the state is not an accepted axiom of Parliamentary government under normal conditions. But Sheikh Abdullah's ministry dismissal in 1953 was precedence against this axiom. The Governor has a right to dismiss a ministry if its presence in office endangers national security or unity.

The conventions of parliamentary government in respect of appointments of ministers are a matter of fact. The head of the state summons the leader of the majority party and commissions him to form the ministry. The leader is the Chief Minister who is on the one hand related to the Governor and on the other to the council of Ministers and finally is the leader in the legislative Assembly. He has duties towards all and he is treated pivotal in the governmental system. The constitution prescribes that it shall be the duty of the Chief Minister:-

a. to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the state and proposals for legislation;

b. to furnish such information relating to administration of the affairs of the state and proposals for legislation as the Governor may call for; and

c. if the Governor so requires to submit for the consideration of the Council of Ministers any matter on which decision has been taken by a minister but which has not been considered by the council. But once the matter so referred to is approved by the council of Ministers it becomes binding on the Governor. It means that the constitution does not empower the Governor to reopen any decision already taken by the Council of Ministers. Only an individual minister's decision can be referred to the consideration of the council of Ministers.

CHAPTER VII

THE STATE LEGISLATURE

The State had the experience of a legislature even before 1947. The Maharaja had conceded it to the State people in 1934, namely a Praja Sabha. However, it gave the right of vote to only six percent of the population including a number of women. The present legislature of the state consists of Governor and two Houses, the Legislative Assembly and Legislative Council. The legislature under the constitution of Jammu and Kashmir part VI deals with composition of the state legislature. The legislative Assembly has one hundred members to be chosen by direct election from territorial constituencies in the state. If the Governor feels that women are not adequately represented in the Assembly, he is empowered to nominate not more than two women to be its members thereof. For the purposes of territorial constituencies, the constitution provides that the state shall be divided into divisions (constituencies) in such a manner that the ratio between the population of each constituency and the number of seats allotted to it shall so far as practicable, be the same throughout the state. The population, as expressed in the relevant section of the constitution is explained to mean population as ascertained at the preceding census of which the relevant figures have been published. Upon the comple-

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tion of each census the number, extent and boundaries of the territorial constituencies are readjusted by such authority and in such manner as the legislature by law determines. This adjustment, however, is not to effect representation in the legislative Assembly until the dissolution of the then existing Assembly.

Section 48 of the constitution relates to the area of the State presently included in Pakistan. It lays down that until the area of the state under the control of Pakistan ceases to be so occupied and the people residing in that part or area elect their representatives

(a) twenty five seats in the legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly; and

(b) the said area shall be excluded in delimiting the territorial constituencies under section 47.

The constitution under section 49 provides that the seats be reserved for scheduled castes. It declares that a number of seats in the state legislative Assembly be reserved for the scheduled castes, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the scheduled castes bears to the population of the state while defining the scheduled castes it says that it has the same meaning and definition as provided in the constitution of India in relation to the state under the provisions of Article 341 of that constitution. These provisions relating to the scheduled castes ceases to have any effect on the expiration of a period of twenty three years from the commencement of this constitution under the constitution of Jammu and Kashmir (Eleventh Amendment) Act, 1970.

The upper house of the Jammu and Kashmir legislature is named as the Legislative Council. Under the Indian constitutional framework; few federating units have second chambers - most of the states abolished them or did not have

them. The legislative council, however, consists of thirty six members, chosen in the manner as provided in section 50 of the constitution. Regarding its membership, eleven members are elected by the members of the legislative Assembly from amongst persons so elected, at least one should be a resident of district Leh and at least one to be the resident of district Kargil. Eleven members are elected by the members of the legislative Assembly from amongst persons who are residents of Jammu and are not members of the legislative Assembly. These elected members should at least represent one member from Doda District and another resident of Poonch. One member is elected by each of the following electorates, namely:-

(a) The members of Municipal Council, Town Area Committees and Notified Area Committees in the province of Kashmir;

(b) The members of Municipal Council, Town Area Committees and Notified Area Committees in the province of Jammu.

Two members are elected by each of the following electorates, namely;-

(a) the members of the Panchayat and such other local bodies in the province of Kashmir as the Governor may by order specify; and

(b) the members of the Panchayats and such other local bodies in the province of Jammu as the Governor may by order specify.

Further eight members are nominated by the Governor, not more than three of whom are persons belonging to any of the socially or economically backward classes in the state, and the others be persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service. Eleven members from Kashmir and Jammu Division are held in

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accordance with the system of proportional representation of the single transferable vote.

The qualifications for membership of the legislature are determined by section 51 of the constitution. According to it a person is not qualified to be chosen to fill a seat in the legislature unless he:-

(a) is a permanent resident of the state, and makes and subscribes before some person authorized in that behalf by the Election Commission of India on oath or affirmation according to the form set out for the purpose in the Fifth Schedule of the constitution;

(b) is, in the case of a seat in the legislative Assembly, not less than twenty five years of age, and in the case of a seat in the legislative Council, not less than thirty years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by the legislature.

The legislative Assembly, unless sooner dissolved, continues to be for a term of five years from the date appointed for its first meeting and no longer, and the expiration of the said period of five years operates as a dissolution of the Assembly. This period, however, is extendable by the state legislature by law, for a period not exceeding one year at a time, while a proclamation of emergency is issued under Article 352 of the constitution of India. The duration was extended in 1975 under such a proclamation and extending the period by one year. The legislative Assembly elected in 1977 has also remained in office for a period of six years. The elections to the present legislative assembly were held in 2002 and is completing its six years tenure by October 2008. The legislative council is not subject to dissolution but as nearly as possible one third of the members thereof retire, as soon as may be, on the expiration of every second

year in accordance with the provisions made in that behalf by legislature by law.

Immediately after the elections to the legislature, the legislative Assembly in its first meeting chooses two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly chooses another member, to be Speaker or Deputy Speaker, as the case may be. The Speaker and Deputy Speaker may vacate their seats or removed as the case may be, if he ceases to be a member of the Assembly. They may resign under their hand addressed if such member is a Speaker to the Deputy Speaker, and if such member is the Deputy Speaker to the Speaker. The officers may also be removed from their offices by a resolution of the Assembly passed by a majority of all the then members of the Assembly. Such a case occurred in 1980 when the Speaker, Mr. Mohi-ud-din Malik, was removed by the Assembly on account of his differences with National Conference. Mr. Malik, however, moved the Supreme Court to that effect but the Court only arrived at a compromise formula. The office of the Speaker in the State till this case was never subjected to politics. However, fourteen days notice to the Speaker is given conveying to him the intention to move the resolution. The Deputy Speaker or any other person of the Assembly has a power to perform the duties of the office of or to act as Speaker, if it is caused vacant by virtue of death, resignation or removal. During the absence of the Speaker from any sitting of the assembly the Deputy Speaker or, if he is also absent, such a person as may be determined by the rules of procedure of the Assembly, or if no such person is present, such other person as may be determined by the Assembly, acts as the Speaker as may determined by the Assembly, acts as the Speaker. However, the Speaker or the Deputy Speaker shall not preside while a resolution for his removal from office is under consideration. The Speaker has a right to speak in, and other-

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wise to take part, in the proceedings of the legislative Assembly while any resolution for his removal from office is under consideration in the Assembly and is notwithstanding anything in section 67, be entitled to vote only in the first instance on such a resolution or on any other matter during such proceedings but not in the case of an equality of votes.

The legislative council, as soon as may be, chooses two members of the Council to be respectively Chairman and Deputy Chairman thereof. Whenever the office of the Chairman or Deputy Chairman falls vacant on any account, the council chooses another member to occupy the place. The same procedure is adopted by the constitution about the Chairman and Deputy Chairman as far the Speaker and the Deputy Speaker of the legislative Assembly with regard to vacation and resignation of, and removal from the offices of the Chairman and Deputy Speaker. Chairman and Deputy Chairman are as may be respectively fixed by legislature by law from time to time. Both the houses of legislature have a separate secretarial staff.

The conduct of business in the legislature starts with the oath or affirmation by members before each takes his seat. Same as otherwise provided by the rules of procedure of the House the quorum to constitute a meeting of the legislative Assembly and of the legislative Councils twenty and ten respectively. A house of the legislative Assembly has power to act notwithstanding any vacancy in the membership thereof and any proceedings in the legislature are valid notwithstanding that it is discovered subsequently that some person who was not entitled to do so, sat or voted or otherwise took part in the proceedings. All questions at any sitting of a house of the legislature are determined by a majority of votes of the members present and voting, other than the Speaker or Chairman or person acting as such. The Speaker, or Chairman or a person acting as such, shall not

vote in the first instance but shall have and exercise a casting vote in the case of equality of votes.

No person can be a member of both the houses of legislature at the same time. If one gets a seat in both, he or she has to resign from one or vacate the seat in accordance with the law. If a member of a house of the legislature resigns his seat in writing under his hand addressed to the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant. A member's seat may also be declared vacant if he absents himself in the legislature for a period of sixty days without any permission. However, the days shall not include such absence as may be caused by reasons beyond his control or any period during which the house is prorogued or is adjourned for more than four consecutive days. A person is disqualified for being chosen and for being a member of the legislative Assembly or the Council, if he holds any office of profit under the Government of India or the State Government within the Union of India, other than an office declared by legislature by law not to disqualify its holder. A member is disqualified on the ground of being of unsound mind and stands so declared by a competent court. If a member is an undischarged insolvent and if he is not a permanent resident of the State or has voluntarily acquired the citizenship of a Foreign state, or is under any acknowledgement of allegiance of adherence to a foreign state, is liable for disqualification. A member may also be disqualified by or under any law made by the legislature.

Ministers are not deemed to hold an office of profit under the Government of India, the State Government or any other State Government within the Union of India. Consequently to be a Minister is not disqualification. In case of dispute with regard to the disqualification of a member, the case is to be referred to the High Court of Jammu and Kashmir for decision and its decision is final. In case the disqualification in question arises from circumstances which

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subsisted at the time of his being chosen as such member, no such representation as aforesaid shall be entertained:-

(a) Unless it is made after the expiration of the period prescribed by law for presenting an election petition calling in question the election of the member; and

(b) If such an election petition is pending or has been tried unless the Speaker or Chairman, as the case may be, is satisfied that the question of the member's disqualification by reason of those circumstances has not been raised or, as the case may be, was not raised in the proceedings on the election petition.

In case a person as member sits and votes before making oath or affirmation when not qualified, he is liable to pay a penalty of one hundred rupees to be recovered as a debt due to the state.

The members of both the houses of the legislature enjoy certain powers, privileges and immunities. Subject to the provisions of the constitution and to the rules and standing orders regarding the procedure of the legislature, there is freedom of speech in the legislature. No member of the legislature is liable to any proceedings in any court in respect of anything said or any vote given by him in the legislature or any committee thereof and no person is liable in respect of the publication by or under the authority of a house of legislature of any report, paper, votes or proceedings. In other respects, the powers and immunities of a house of the legislature and of the members and the committees of a house of legislature are such as may from time to time be determined by the legislature by law, and until so defined shall be those of the Parliament of India and of its members and committees. Members of the legislative Assembly and the legislative Council are entitled to receive such salaries and allowances as may from time to time be determined by the legislature by law and until provision in that respect is so made, salaries and allowances at such rates and upon such

conditions as were immediately before the commencement of this constitution applicable in the case of members of the constituent Assembly. However, these salaries have by now been defined or fixed by the law of the legislature.

The constitution of Jammu and Kashmir provides a procedure for making laws by the legislature. It lays down that subject to the provisions of section 75and 76 a bill is not deemed to have been passed by the legislature unless it has been agreed to by both the houses, either without amendment or with such amendments, only as are agreed upon by both the houses. A bill pending in the legislature does not lapse on a dissolution of the Assembly. The Upper House (Legislative Council) has restricted powers and jurisdiction as compared to the lower House. The constitution provides that if after a bill has been passed by the Legislative Assembly and transmitted to the Legislative Council:-

(a) the Bill is rejected by the council; or

(b) more than three months elapse from the date on which the Bill is laid before the Council without the Bill being passed by it; or

(c) the Bill is laid, passed by the council with amendments to which the legislative Assembly does not agree;

The Legislative Assembly may, subject to the rules regulating its procedure, pass the bill again in the same or in any subsequent session with or without such amendments, if any, as have been made, suggested or agreed to by the legislative Council. If after a bill has been passed for the second time by the legislative Assembly and transmitted to the legislative council:-

(a) the bill is rejected by the council;

(b) more than one month elapses from the date on which the bill is laid before the council without being passed by it; or

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(c) The bill is passed by the council with amendments to which the legislative Assembly does not agree; the bill is deemed to have been passed by both the houses of the legislature in the form in which it was passed by the legislative Assembly for the second time with such amendments, if any, as were made or suggested by the legislative council and agreed to by the legislative Assembly. However, it does not apply to money bills.

There are separate provisions for money bills. There is a special procedure in respect of money bills and it is laid in it that such a bill cannot be introduced in the legislative Council. After money bill is passed by the legislative Council for consideration within fourteen days. Within the prescribed period the Council may return the bill to the lower house with its recommendations. The legislative Assembly accepts any of the recommendations of the legislative Council, the money bill is deemed to have been passed by both the houses by the legislative Assembly without any of the amendments suggested by the legislative Council. If a money bill passed by the legislative Assembly and transmitted to the legislative Council for its recommendations is not returned to the legislative Assembly within the said period of fourteen days, it shall be deemed to have been passed by both the houses at the expiry of the said period in the form in which it was passed by the legislative Assembly.

The constitution further defines the money bills and it lays down that a bill is deemed to be a money bill if it contains only provisions dealing with all or any of the following matters, namely:-

(a) The imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the state, or the amendment of the law with respect to any financial obligations undertaken by

the state;

(c) the custody of the consolidated fund or the contingency fund of the state, the payment of moneys into or withdrawal of moneys from any such fund;

(d) the appropriation of money out of the consolidated fund of the state;

(e) the declaring of any expenditure to be expenditure charged on the consolidated fund of the state or the increasing to the amount of any such expenditure;

(f) the receipt of money on account of the consolidated fund of the state or the public account of the state or the custody of such money; or

(g) any matter incidental to any of the matters specified in clauses (a) to (f) (enumerated above) of section 77 of the Jammu and Kashmir constitution.

A bill is not deemed to be a money bill by reason only that it provides for the imposition of fines or pecuniary penalties, or for the demand or payment of fees for licensees or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes. In case of a question whether a bill introduced is money or non-money bill, the Speaker is empowered to give a decision and that decision is final. The Speaker has also to sign and certify a bill to be a money bill when it is submitted to the Governor for final assent. When a bill is passed by both the houses of the legislature, it is presented to the Governor for assent. He may assent to it or withhold it. The Governor has the power, either through message or otherwise to return the bill for reconsideration of the house. If his request is not agreed to by the legislature and the latter returns the bill without any change, the Governor has no constitutional remedy but to assent to it on its second presentation.

The constitution also provides a procedure in financial

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matters and lays down that the Governor is, in respect of every financial year, cause to be laid before both houses of the legislature a statement of the estimated receipts and expenditure of the state for that year- which is referred to as the "Annual Financial Statement." The estimate of expenditure embodied in the annual statement has to show separately:-

(a) the sums required to meet expenditure described by the constitution as expenditure charged upon the consolidated fund of the state; and

(b) the sums required to meet other expenditure proposed to be made from the consolidated fund of the state.

It distinguishes expenditure on revenue account from other expenditure. The following expenditure is considered to be expenditure charged on the consolidated fund of the state:-

(a) the emoluments and allowances of the Governor and other expenditure relating to his office;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the legislative Assembly;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of the loans and the service and redemption of debt;

(d) expenditure in respect of the salaries and allowances of the judges of the High Court;

(e) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(f) any other expenditure declared by the constitution of Jammu and Kashmir or by legislature by law, to be so charged. So much of the estimates as relates to expenditure charged upon the consolidated fund of the state is not submitted to the vote of legislative Assembly but the Assembly

is not prevented from a discussion on it. However, so much of said estimates as related to other expenditure is submitted in the form of demands for grants to the legislative Assembly and it has the power to assent to any demands subject to a reduction of the amount specified therein. Constitutionally, no demand for grant is made except on the recommendations of the Governor.

As soon as the grants are made by the legislative Assembly, a bill to provide for the appropriation out of the consolidated fund of the state of all moneys is introduced to meet:-

(a) the grants so made by the Assembly; and

(b) the expenditure charged on the consolidated fund of the state but not exceeding in any case the amount shown in the statement previously laid before the houses.

No amendment however, to any bill in either house of legislature which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the consolidated fund of the state and the decision of the person so presiding as to whether an amendment is admissible or not is final. No money, consequently, is withdrawn from the consolidated fund of the state under appropriation made by law passed in accordance with the constitution. If the Annual Financial Statement is not sufficient in case of any service or department, the Governor can place demands for supplementary, additional or excess grants. Pending the completion of the procedure for the financial settlement, advance grants can be voted by the legislature under section 83 of the constitution. Such advances may include unexpected demands upon the resources of the state.

The constitution provides certain general rules with regard to the state legislature. It lays down that it has power to make rules for regulating its procedure and the conduct

of its business subject to the provisions of the constitution. The Governor, after consultation with the Speaker of the Assembly and the Chairman of the Council, can make rules as to the procedure with respect to communications between the two houses. The transaction of the legislature is conducted in Urdu or English, but the Speaker and the Chairman of the Assembly and the Council respectively can permit a member to speak in Hindi or in his mother tongue. The official records are maintained in English and Urdu but all the bills and acts are documented in English. The members have no right to discuss the conduct of any judge of the High Court or Supreme Court of India. The validity of any proceedings in the legislature is not called in question on the grounds of any alleged irregularity of procedure. Nor is any officer held responsible if he had the power to regulate procedure or the conduct of business. No law is declared invalid if assented to by the Governor on the basis that some recommendation required by the constitution was not given.

CHAPTER VIII

THE STATE JUDICIARY

The judicial system uptil Maharaja Hari Singh in the State of Jammu and Kashmir usually devolved round the king's court. It was in March 1928 that a High Court comprising a Chief Justice and two puisne judges was established by His Highness, Maharaja Hari Singh. The judges of this High Court held office during the pleasure of Maharaja Hari Singh. In 1930, in view of the marked improvement in the judicial administration of the state, the jurisdiction exercised by Residency Courts in certain categories of civil cases was ceded to the state courts. However, in the post 1947 the tradition continued and when the constitution was drafted it created a High Court of judicature for the state as the highest court.

The High Court consists of the Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. The President of India appoints the Chief Justice of the High Court by warrant under his hand and seal after consultation with the Chief Justice of India and the Governor of the State. The procedure for appointing other judges is the same except that the Chief Justice of the High Court of the state is also consulted. A judge of the High Court must be a citizen of India and must have held

ten years judicial office in the territory of India. Further, he must have been, at least ten years an advocate of a High Court. The constitution does not provide for the appointment of non practicing lawyers as judges of a High Court, but a person is qualified for appointment as a judge of the Supreme Court if he is, in the opinion of the President, a distinguished jurist. The judges hold office in the case of an additional or acting judge, as provided in section 100-A, and in any other case until he attains 62 years of age. If any question arises as to the age of a judge of the High Court, it is decided by the President after consulting the Chief Justice of India and such a decision of the President is final.

Every person appointed to be a judge of the High Court has to make and subscribe before the Governor or some person appointed in that behalf by him before the judge's entry into his office, an oath or affirmation according to the form in the Fifth Schedule. The form:-

I having been appointed Chief Justice (or a Judge) of the High Court of Jammu and Kashmir do swear in the name of God/ solemnly affirm that I will bear true faith and allegiance to the constitution of state as by law established, that I will uphold the sovereignty and integrity of India, that I will duely and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or ill will and that I will uphold the constitution and the laws.

For the purpose of appointment in computing the period during which a person has been an advocate of a High Court there is included any period during which the person has held judicial office after he became an advocate.

The salaries and allowances of the judges are provided for under section 98 of the constitution. These salaries are specified in fourth schedule. Every judge shall be entitled to such allowances and such rights in respect of leave of absence and pension as are specified in the same schedule.

The exception to the rule is the judge of the High Court who at the time of his appointment is in receipt of a pension, other than any disability, in respect of any previous service under the Government of India or any other State Government by the reduction in his salary to the amount of the pension or in respect of the portion of the pension equivalent to that of his gratuity. Further, the judges enjoy leave of absence, allowances, pensions and other conditions of service under the High Court Judges Act 1954 (central Act no. 28 of 1954). In the fourth schedule of the constitution the expression "Chief Justice" falls under an acting Chief Justice and a judge includes an additional judge and an acting judge. When the office of the Chief Justice is vacant or when the Chief Justice is by a reason of absence or otherwise unable to perform the duties of his office, the duties of the office are performed by such one of the other judges of the court as the President appoints for the purpose. Consequential upon such a situation, Honourable Justice Bahau-Din Farooqi's acting official position remained controversial from 1980-83. In April 1983 he was confirmed as the Chief Justice of the High Court of Jammu and Kashmir. The constitution provides that neither the allowances nor his rights in respect of leave of absence or pension be varied to the disadvantage of any judge after his appointment. A judge of the High Court may, by writing under his hand addressed to the President, resign his office. If by reason of any temporary increase in the business of the High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that court should be for the time being increased the President may appoint duly qualified persons to be additional judges of the court for such period not exceeding two years as he may specify. When any judge of the High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Jus-

tice the President may appoint a duly qualified person to act as a judge of that court until the permanent judge has resumed his duties. No person appointed as an additional or acting judge of the High Court is eligible to hold office after he attains the age of 62 years. With the previous consent of the President the Chief Justice of the High Court may request any person who has been a judge of any High Court in India, hold the office of a judge of the state of Jammu and Kashmir. Every such person so requested while acting and sitting as a judge be entitled to such allowances as the President may by order determine. He will enjoy all the jurisdiction, powers and privileges of a judge but he shall not be deemed to be a judge of the High Court. Such a status of a judge is subject to the consent of the appointee.

The usual place of sitting of the High Court is either Jammu or Srinagar. It is for the Chief Justice to decide, with the approval of the Governor as to the number of judges who shall sit from time to time at Jammu and at Srinagar for such period as may be deemed necessary. Whenever it appears to the Chief Justice that it is desirable that the High Court should hold its sitting at a place other than Srinagar and Jammu, he has power to do so. In such case one or more judges of the High Court as determined by Chief Justice shall with the previous approval of the Governor sit at such place.

Subject to the provisions of the constitution of Jammu and Kashmir and to the provisions of any law for the time being in force, the jurisdiction of and the law administered in the High Court and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof, sitting alone or in division courts, shall be the same as immediately before the commencement of this constitution.

The High Court of Jammu and Kashmir has many pow-

ers. Apart from its appellate and revisional jurisdiction the constitution also vests in the High Court power to issue certain writs. It lays down that the High Court has the power to issue to any person or authority including government within the state, directions, and orders of writs. These include writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them. These can be issued for any purpose other than those mentioned in clause (2-A) of Article 32 of the constitution of India. The Article 32 of the Indian constitution includes the right to move the Supreme Court for the enforcement of Fundamental Rights. Naturally it could not be granted against the State High Court. The High Court has a power of superintendence and control over all courts subject to its appellate or revisional jurisdiction and all such courts shall be subordinate to the High Court. It means that the Court may call for returns from all courts; make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts kept by the officers of any such court. The High Court has also the power to settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practicing therein. However, these rules, forms and tables settled cannot be inconsistent with the provisions of any law for the time being in force and thereby require the previous approval of the Governor. The High Court has a power to get transferred a case to its own court if it is satisfied that a case pending in a court subordinate to it involves a substantial question of law. It is substantial as to the interpretation of the constitution of Jammu and Kashmir or the constitution of India - the determination of which is necessary for the disposal of the case. Consequently it can withdraw the case and may:-

(a) either dispose off the case itself; or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgement on such question and the said court shall on receipt thereof proceed to dispose off the case in conformity with such judgement.

The High Court of the state has a power to possess and use as occasion my require a seal bearing a device and impression of the state emblem with an exergue or label surrounding the same with the inscription;

"The seal of the High Court of Jammu and Kashmir."

The seal is to be delivered to, and kept in the custody of, the Registrar or such other officer of the court as the Chief Justice may designate in this behalf.

Different officers and servants of the High Court are appointed by the Chief Justice of the state. These officers and servants may be made by the Chief Justice or such other judge or officer of the court as he may direct. However, in such cases as may be specified in the rule, no person not already attached to the court can be appointed to any office connected with the court except after consultation with the State Public Service Commission. The conditions of service of the officers and servants of the High Court are subject to the provisions of any law made by the legislature. But rules may be prescribed by the High Court with the approval of the Governor. All the fees or moneys taken by the court, form part of consolidated fund of the State. Consequently, the administrative expenses of the High Court including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court are charged upon this fund.

The Governor of the state has a power to appoint all district judges. However, appointment of persons to be, and the posting and promotion of district judges is to be made by the Governor in consultation with the High Court. Any

person is eligible to be appointed as district judge if not in service of the state but having not less than seven years experience as an advocate or a pleader. The High Court usually recommends two types of people for appointment as district judges - that not in service having seven years experience as an advocate or a pleader and, secondly, those of the judges of the lower courts who are in service or in state service on the basis of seniority cum -merit.

The constitution validates all postings and transfers of and judgements etcetra delivered by certain district judge before the commencement of the constitution of Jammu and Kashmir (ninth amendment) Act, 1967. The judges of the lower courts than district courts are made by the Governor of the State. The Governor however appoints them in accordance with the rules made by him in that behalf after consultation with the Public Service Commission and with the High Court.

The control over district courts and other subordinate courts is vested in the High Court. It includes the posting and promotion, grant of leave to person belonging to the judicial service of the state and holding any post inferior to the post of district judge is also vested in the High Court. However, nothing in this section is construed to take away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. The judicial service means a service consisting exclusively of persons intended to fill the post of district judge and other civil, judicial posts inferior to the post of district judge.

The Governor had a power by public notification to direct that the provisions relating to the High Court and rules made there under was to be effected from such date as might have been fixed by him. Consequently, the provisions are

applicable in relation to any class or classes of magistrates in the state as they apply in relation to persons appointed to the judicial service of the state, subject to such exceptions and modifications as may be specified in the notification by him.

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CHAPTER IX

THE CONSTITUTIONAL AMENDMENT

Any constitution, written in nature, demands to incorporate in it, a procedure for its amendment. The process of amendment may be rigid or flexible or semi rigid or semi flexible or both rigid and flexible. Indian constitution follows both flexible - rigid method and Constitution of J & K, incorporates the same method in it.

The amendment to the constitution of Jammu and Kashmir is initiated through the introduction of a Bill, for the purpose of amendment, in the Legislative Assembly. When the Bill is passed in each house by a majority of not less than two thirds of the total membership of that house, it is presented to the Governor for his assent. Upon such assent being given to the bill the constitution stands amended in accordance with the terms of the bill. In case of the abolition of the Legislative Council, a bill needs to be introduced in the Legislative Assembly and passed by a majority of the total membership of the Assembly and by a majority of not less than two thirds of the members of the Assembly present and voting.

The constitution lays down that the section 147, dealing with amendment of the constitution, is not amendable. Further the constitution of Jammu and Kashmir is not amendable, under any circumstances, to amend section 3 and 5. The Section 3 of the constitution deals with the relationship of the state with the Union of India and declares

the State of Jammu and Kashmir to be an integral part of the Union of India. In addition section 5 provides that the executive and legislative power of the state extends to all matters except those with respect to which Parliament has power to make laws for the state under the provisions of the constitution of India. The section 147 of the constitution relating to amendments further lays down that the provisions of the constitution of India as applicable in relation to the state shall neither be introduced nor moved in either house of legislature.

Upto 2002 there were as many as twenty-nine amendment orders to the constitution of Jammu and Kashmir under the provisions of section 147. As the provisions of the constitution of India (as applicable in relation to the state of Jammu and Kashmir) are not amendable therefore, first such order was made on 26th June 1950. (C.O 10 dated 26-06-1950). This order was represented by the constitution amendment order 1954(C.O 48 dated 14-5-1954). By the end of the year 1973 as many as 262 Central Acts were applicable to the State of Jammu and Kashmir. The highest number of amendments to the constitution were during the period 1953-1975.

Justice A.S Anand writes, "the constitution, (application to Jammu and Kashmir) order, 1954 was first amended in 1956 by C.O 51, dated 11-02-1956, then by C.O 55 and by C.O 56 in 1958, it was amended by C.O 57 and C.O 59. Again in 1960 by C.O 60 and C.O 61. It was further amended from 1961 to 1964 by CO, Nos. 62, 66, 69, 70, 71, 72, 74, 75, 76, 77, 79, 80, 83, 85, 86, 89, 90, 91, 92, 93, 94, 95, 97, 98, 100, 101, 103, 104, 105, 106, 108, 122, 124, 129, 151 and 154. The effect of all these amendments has been to bring the position prevailing in he state more at par with the rest of the country and further strengthen the bonds of harmonious association of the state with the rest of the country."

Under the first amendment to the constitution, in addition to others, sub-section 2 and sub-section 3 of section 99

were omitted. In sub-section 2 a Judge of the High Court of Jammu and Kashmir could not be removed from his office except by an order of the President passed after an address by each house of the legislature of Jammu and Kashmir supported by a majority of the total membership of that house and by a majority of not less than two third of the members of that house present and voting had been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity. Under sub section 3 the legislature were empowered to regulate the procedure of an address and for the investigation and proof of the misbehavior or incapacity of a judge. This amendment also omitted section 106 under which judges were prohibited to practice in courts or before any other authority. The provisions of the amendment followed on the proposition that the jurisdiction of the Supreme Court was extended to the state of the Jammu and Kashmir and the High Court was made subservient to the provisions of the Indian Constitution.

In the very first amendment of the constitution the power of the Election Commission of India was extended to the State of Jammu and Kashmir. Accordingly section 138 was substituted by different wording under which the superintendence, direction and control of elections, which remained in the Sadar-i-Rayasat uptil the amendment, were transferred to and vested in the Election Commission of India.

The constitution of Jammu and Kashmir (first amendment) Act 1959, was the first step towards the merger of state within the constitutional framework of India. Most of the amendments of such nature were made during Mr. Sadiq's regime.

The second amendment Act 1960 amended second schedule of the constitution of J&K. Under it remuneration and other allowances relating to the Sadar-i-Riyasat were

increased. Under the third amendment Act of 1961, section 49 of the constitution was amended so that reservation of seats for scheduled castes which were amended so that reservation of seats for scheduled castes which was to cease on the expiration of a period of five years was extended to thirteen years.

The constitution of Jammu and Kashmir, fourth amendment Act, 1963, amended the fourth schedule to the constitution. This amendment brought the judges of the High Court of Jammu and Kashmir and judges of other High Courts in India, at par in matters relating to their actual service in different courts and their leave of absence.

The constitution of Jammu and Kashmir fifth amendment Act, 1963, omitted subsection-4 clauses (c) and (d) of section 50, under which teachers from Jammu and from Kashmir province respectively elected one member each to the State Legislature.

The sixth amendment of the constitution had further bearing on the merger of the State within the constitutional framework of India. Under this amendment the expressions "Sadari-i-Riyasat" and "Prime Minister," wherever they occurred, were respectively substituted by the expression of the "Governor" and "Chief Minister". The Governor was subject to the appointment by the President by warrant under his hand and seal. However, the Sadari-i-Riyasat continued under the amendment to be Governor uptil his term he was elected as Sadari-i-Riyasat expired. It also provided the qualifications or eligibility for the appointment of a Governor. Consequently under this amendment the office of the head of the State was made subject to appointment instead of being elective. Accordingly a form was attached to it to be used as the oath of office. Under section 33 of the constitution when a vacancy occurred in the office of the Sadar-i-Riyasat by reason of his death, resignation or removal or inability of any kind, a person could be recommended to

the President of India by the Council of Ministers of the State to recognize him as the acting Sadar-i-Riyasat. This provision was amended under sixth Amendment Act and the President was permitted to make such provision as he thinks fit for the discharge of functions of the Governor in any contingency. Under the fifth schedule of the constitution a form of the oath of office is laid under which a permanent resident of the State has to bear true faith and allegiance to the constitution of the State and to affirm to uphold the sovereignty and integrity of India.

Amending Article 126 in subsections (2) and (3) the dismissal, reduction or removal of persons employed in civil capacities under the State were subjected to the inquiry. No person could be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him. He is to be given reasonable opportunity of being heard in respect of those charges. A punishment or penalty could be imposed on him only after given a reasonable opportunity of making representation on the penalty proposed.

Under seventh Amendment Act, 1965, a new schedule, not exceeding maximum amount, is provided as against the emoluments and other allowances of the Governor of the State, under second schedule. The Eighth Amendment Act, 1967, provided that the words, "including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with such elections," were omitted. In ninth Amendment Act, 1967, the postings, transfers of and judgments etcetra delivered by certain district judges were validated.

The tenth Amendment Act, 1968, and eleventh Amendment Act of 1970, related to the amendment of the second schedule and section 49 of the constitution of Jammu and Kashmir, respectively. The tenth amendment substituted new words in para 2 and 3 of the second schedule. In sec-

tion 49 the words, "five years" were replaced by "thirteen years" for the reservation of seats for schedule castes.

The amendment to the state constitution is subject to two fold erosion. On the one side an amendment is moved in the State Legislature and on the other it comes through the application of changes by the application of the Indian constitution to the State. The orders to the effect of amendment may come in the form of amendment Acts or Acts of the Parliament- bringing the constitution of Jammu and Kashmir at par as the constitution of India is applicable to other States of India. However, very minor exceptions might be observable— — those, too on account of political expediency and not because of legal necessity.

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CHAPTER X

THE STATE SERVICE

The Government of the State of Jammu and Kashmir, operates through its secretariat. The secretariat in the State is divided into departments among whom various subjects of governmental activity are distributed according to administrative convenience. Besides the political heads of various departments of government there are a number of permanent officials and clerical staff. At the head of each department is a permanent Commissioner/Secretary. The Commissioner/Secretary is the keyman in the department who helps his political chief to see that the department works efficiently and in a particular direction. Usually a Commissioner/Secretary acquires complete grasp of affairs within his department. Then there are in the department, possibly a Joint Secretary, a Deputy Secretary, an Under Secretary, Assistant Secretaries, Superintendents and many others who do merely secretariat work of a purely routine character.

The State of Jammu and Kashmir had a legacy of an administrative set up, which it carried over in the post 1947 from the Maharaja's administration. Though the administration in the State had been reduced to shambles on account of uncertainty during 1947, yet it retained some kind of es-

sence. The history of civil administration in Jammu and Kashmir reveals that administration had become local oriented to some extent between the years 1920-24. In early 1920's when during the rule of his uncle Maharaja Hari Singh became a member of the State Council, orders were issued to provide for:

i) employment of State subjects only to all ordinary vacancies; and

ii) grant of lands for house -buildings and other purpose to State subjects only.

It was during this period that a committee was appointed comprising certain official and non-official members, to suggest definition of the term 'State Subject.' The recommendations of the committee were accepted and orders were issued to the effect under Judicial Department Notification No: I -L- 84 dated the 20th April, 1927.

A committee was appointed as early as 1923 to consider the future requirement of the different departments in technical qualification and experience and make proposals for grant of scholarships for training to qualified State subjects. This committee was reconstituted in 1927 as the Scholarship Selection Board. The board selected nearly thirty State subjects before the II world war to receive training in Europe, America and British India. The training was promised by the Board in Civil Engineering, Architecture, Town Planning, Medicine, Veterinary Science, Pharmaceutics, Horticulture, Sericulture, Forestry, Printing, Law and Public Administration. Training both academic and technical was also imparted to the State subjects in Indian institutions. The lump sum provision was made in the budget of 1937-38 for grant of loans to persons desirous of prosecuting advanced or special training in India or abroad. These loans were continued to be paid uptil 1947. In the post 1947, interest free loans were granted to those who pursued higher or technical education, in greater magnitude.

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The Maharaja of Kashmir, after the upsurge of 1931, tried to appease the Muslims of the State. Consequently, in his proclamation on 9th July, 1931, he declared that while in the matter of service, prior consideration would go to public interest and maintaining the efficiency of administration, adequate representation to all communities in the services without giving any preponderance to any community, shall be provided. The publication of the report of the Glancy Commission further ensured a fair representation to the Muslims. The publication was also followed with rules relating to recruitment to Gazetted and non-gazetted services. Before 1947 there were 5, 070 Muslim officials, including 150 Gazetted officials out of a total strength of 13, 790 officials including 525 gazetted officials in the superior service. In the inferior, Muslims numbered 3, 760 out of a total strength of 7,943, in April 1945 against 3,542 out of total strength of 8,360 in April 1932. According to Government sources, by April 1945 the Muslims formed about 40 per cent of the total strength of the civil services. However, all these Muslims were not State subjects.

The post 1947 witnessed a mighty expansion in the civil service, both in emergency administration and later in normal administrative functioning. Each department expanded from time to time. The constitution of Jammu and Kashmir provided in its Chapter IX matters relating to recruitment and conditions of services of the State. The Legislature is empowered by law to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the State. During the absence of or, in the presence of, delegation of such power to direct and to make rules regulating the recruitment and the conditions of service of persons appointed in the State. Every member of the civil service, except as expressly provided by the constitution, holds his office during the pleasure of the Governor of the State. The Governor has also a power to grant compensation if, before the expiration of a

contract, the post is abolished or the person has to be removed in public interest. No person who is a member of a civil service of the state or holds a civil post under the state shall be dismissed or removed by an authority subordinate to that by which he was appointed. A civil servant shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity making representation on the penalty proposed, but only on the basis of the evidence, adduced during such inquiry. This right of a civil servant is not applicable to such a person who is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge or where it is reasonable not to conduct such an inquiry or Governor is satisfied that such inquiry is not necessary.

The constitution for the purpose of regulating civil service creates a public service commission, under the provision of the constitution. Its members are subject to the appointment by the Governor provided one-half of them are appointed with due regard to such persons who at the dates of their respective appointments have held office for at least ten years under the Government. A member of the Commission holds office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty five years, whichever is earlier. However, the members are liable for removal on the grounds of misbehaviour provided a reference is made to the High Court by the Governor and if the Court confirms the charge. The disqualification for removal of the Chairman of the Public Service Commission or other members also include:-

If the Chairman or any other member is adjudged an insolvent or engages his term of office in any paid employment outside the duties of his office or is, in the opinion of the Governor, unfit to continue in office by reason of infirmity of mind or body.

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The Governor has power to make regulations as to the conditions of service of members and staff of the Commission. He has power to determine the number of members of the staff of the Commission and other conditions of service and determined by the Governor through regulations.

The functions of the Commission are related to the conduct of examinations for appointments to the service of the State. For example it conducts examinations for K.A.S., K.P.S. and K.C.S. (Judicial) and examinations relating taxation officers and revenue officers. The Commission is consulted on all matters pertaining to methods of appointment to civil services and for civil posts. It also recommends the principles to be followed in making appointments to civil service and for civil posts, and also in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers. It also provides advice relating to all disciplinary matters affecting a person serving under the Government including memorials or petitions relating to such matters.

The Commission is presided over by a Chairman, in whose absence on account of inability to perform his duties on any reason, those duties are untill some person is appointed, performed by any other person appointed by the Governor. This is usually the senior member who acts as the Chairman. The legislature has the power to extend by an act the functions of the Commission. The expenses of the Commission, including any salaries, allowances and pensions payable to or in respect of the members of the staff of the Commission, is charged on the Consolidated Fund of the State. It is the duty of the Commission to represent annually to the Governor a report as to the work done by the Commission.

The Governor on receipt of such report may cause a copy thereof together with a memorandum explaining, as respect the case, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance is to be laid before the legislature.

For the last many decades, in particular since the promulgation of the constitution of J&K and the constitution of India in its application to the State, many statutory materials relating to public service were issued from time to time. The rules relating to salaries, leave, pension and other allowances are provided in the J & K Civil Service regulations. There are existing rules regarding recruitment to public service and rules pertaining to in-service cadres and ranks. The rules dealing with a number of important matters relating to public services in general including recruitment, promotion, seniority and disciplinary proceedings were originally sanctioned by government in March 1939 and were called State Civil Service Rules (General). These rules were revised and replaced by the rules of the same name in 1954 by cabinet order No. 1227 - C of 1954 dated 16th September, 1954.

The aforesaid rules of 1954 were replaced by the Civil Service (classification, control and appeal) Rules 1956, which were sanctioned by Government under order No. 962-C of 1956 dated 14th June, 1956, in exercise of the powers conferred by sub-section (I) of section 3 of J&K Civil Service (Removal of doubt and Declaration of rights), ordinance, 1956. This ordinance was later replaced by Act No. XIV of 1956, under the same name. By virtue of section 127 of the constitution of Jammu and Kashmir, these rules continue to be in force as if made in exercise of the powers conferred by the proviso to section 124.

The statutory provisions made by the State, besides the Jammu and Kashmir Civil Service, Disciplinary proceedings, Tribunal rules, 1958 and safeguarding of security of state rules 1962, with respect to disciplinary matters are many.

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Being scattered they were published collectively in several volumes containing the laws of the State. Apart from the penal law relating to bribery and corruption by public servants contained in the Ranbir Penal Code and the Prevention of Corruption Act, Smvt. 2006 (1949 A.D), the State has enacted several measures for administrative action in respect of the same matter which, stated in chronological order, are as follow:

1. The Jammu and Kashmir Public Servants Inquiry Act, Smvt. 1977 (1920 A.D);

2. The Prevention of Corruption Ordinance, Smvt. 2001 (1944 A.D);

3. The Public Servants Transfer of Immovable Property, Smvt. 2004 (1947 A.D);

4. The Jammu and Kashmir Servants Prevention of Corruption (Commission) Act, 1962.

The Prevention of Corruption Ordinance was promulgated by the Maharaja of Kashmir, on the advice of late Sir B.N. Rao, an eminent jurist. The said ordinance and the ordinance on he Public Servants Transfer of Immovable Property were promulgated by the Maharaja in exercise of his inherent legislative powers vested in him by section 5 of the Jammu and Kashmir Constitution Act, Smvt. 1966 (1939 A.D). Except the Jammu and Kashmir Public Servants Inquiry Act, 1920 A.D which corresponds to the Indian Act No 37 of 1850, the remaining three measures are peculiar to our State and have, according to R.K. Kaul, no parallel anywhere in the rest of the country.

Recruitment to public services has two dimensions, as the services in the State are divided into gazetted and non-gazetted cadres. Sometimes the non-gazetted cadres are named as subordinate services. Consequently, there were originally two separate sets of recruitment rules. The one dealt with gazetted service in general and the other with the

non-gazetted service. It is a matter of recent development that separate rules relating to individual services have been made. Rules relating to gazetted services have been framed and certain regulations have been framed in respect of a few non- gazetted service. Let me examine both the services separately. The first step in regard to gazetted services was taken in 1939, when public services were classified into different services and rules prescribing the procedure relating to recruitment of these services were sanctioned by Council Order No.: 1328-C of 1939. These rules inter alia prescribed general qualifications for all services and technical qualifications for certain services, the prospective in which appointment of direct recruitment to certain services and for special tests and trainings for probationers in some services. This cadre of services was also classified, sanctioned vide Order No. 1630-C of 1955 dated 1st October 1955. The order of 1939 is mostly modified and it relates only to such services for which either fresh or amended rules have not been framed so far. There are two services in regard to which the rules now made provide only for recruitment. One of them is K.C.S (Judicial) the appointment to which is governed by the Jammu and Kashmir Judicial Service (Recruitment) Rules, 1967. The rules for the gazetted and non-gazetted service of the Jammu and Kashmir Transport Department were made in 1955. Later, in pursuance of the policy to have separate rule for gazetted services, the Jammu and Kashmir Government Transport undertaking and Transport Commissioner's Organization (gazetted) Service Rules 1970, were made. Consequently, the Rules of 1955 ceased to be operative.

The pay scale or grades of various posts in the government have undergone many changes. These scales have been revised several times. Even the Jammu and Kashmir Civil Services (Revised pay) has under gone not less than thirty-nine amendments so far. Presently the pay scales have under gone drastic changes and amendments in the rules since the orders of 1939 and 1955 were carried. Further, dearness allowances, as admissible to Central Government employees, has been granted to the State Government employees. Its instalments are being released to the employees from time to time.

Let me now discuss the present constitution of the Kashmir Administrative Service. In the order of 1939 and 1955 this service was termed as Kashmir Civil Service (Executive) and was generally confined to the service of Revenue Department only. However, during the first two or three years in early forties recruitment to department of Revenue, Co-operatives, Audit and Accounts, Customs and Excise was made on the basis of a competitive examination for K.C.S. (Executive). This service was abolished and the Jammu and Kashmir Administrative Service was introduced in 1962 by SRO-3 of 1962, which extended its domain over many other departmental services. The order was replaced under SRO-188 of 1965 and was reconstituted comprising not only the Executive/ Revenue Service, but also some posts from the erstwhile cooperative service, excise service and other services also. This reconstitution of the service, entitled the rules relating to competitive examinations for members of the service. The council order No.1328-C of 1939, SRO-164 and Government order No. 159-C of 1966, do provide or repeal the rules regarding these examinations. As were in vogue even before 1947, in case of Naib Tehsildars and Tehsildars etc. In 1964, departmental examination rules for Naib Tehsildars, Tehsildars and Deputy Commissioners were provided under Government Order No. LB-137/64 and superceded in October 1964 under SRO-345 of 1964, but by a corrigendum issued by Revenue department in 1965 Government Gazette, a separate syllabus was provided for these departmental examination. The rules provided in 1964 and 1965 were reconstituted under SRO-455 of 1968, with

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an exception in case of Naib Tehsildar examinations. Those persons who had appeared and given four consecutive chances irrespective of the number of chances availed by them under the said rules were exempted. The present position therefore, is that in regard to Naib Tehsildars the rules issued under SRO-345 of 1964 and in regard to I.A.S. and K.A.S. and other officers, the rules issued under SRO-455 of 1968 are in force.

With regard to the rules relating to recruitment of non gazetted services, different measures were adopted from time to time. Rules regarding the classification of and the method of recruitment to superior non-gazetted services were for the first time sanctioned by council order No: 29-C of 1942. These rules among other things classified the subordinate services into a number of services, prescribed general qualifications for all services and special qualifications for certain services laid down the method of recruitment for the same. Later these rules were superseded by the rules laid down in council order No. 1296-C of 1954. The Jammu and Kashmir Subordinate Service (Recruitment) Rules, 1963 were sanctioned by SRO-414 of 1963. These Rules provided for Constitution of Selection Boards at the State and provincial levels for direct recruitment to non-gazetted appointments in various services. These rules were rescinded by SRO-220 of 1964. This SRO-220 provided for constitution of District Selection Boards for recruitment in various services other than state service. The maximum of the posts in both cases are those exceeding Rs. 80.00 per month. The rules of 1963 as well as those of 1964 withdrew from all administrative authorities the power of recruitment of services, appointment of which was assigned to the respective selection Boards in pursuance of these rules. These rules of 1964 were repealed by SRO-231 of 1965. This order that the appointments be made as envisaged under earlier order of 1964 was subject to two conditions. Firstly, the minimum qualifications for a post shall be fulfilled and secondly that the competent authority shall act in previous consultation with the Minister-in-charge. Later a Cabinet sub-committee was formed to formulate government policy, from time to time, with regard to recruitment.

Regarding decentralization and recruitment of non-gazetted cadres rules were further issued under SRO-588. The SRO repealed the earlier rules under SRO-231 of 1965. The rules classified the non-gazetted services in three cadres —the State cadre, the Divisional cadre and the District cadre and provided for the constitution of the State Recruitment Board, the Divisional Recruitment Boards, and also for that of a departmental promotion committee for each department at the State and Divisional levels. These recruitment Boards made selections for various in-service promotions within their cadres. The competent authorities are required to make appointment in accordance with such selection. However, it (SRO-588 of 1969) clearly states that all matters not expressly provided for under these rules shall be regulated by the rules and orders applicable to the services in general. The non-gazetted posts in the Police Department have however, been exempted from these rules. The result of the above measures is that the rules of 1942, with classification as modified by the order of 1954, have full effect in regard to matters not expressly provided for by the rules of 1969. For few non-gazetted services the rules of 1942, as modified in respect of classification of services by Cabinet Order No. 1299- C of 1954, have ceased to be of any effect. Being difficult to go through the pay scales of existing enormous public servants, the pay scales, in case of gazetted officers provided for in the rules of 1942/1954 were omitted. It is desirable here to refer to the Government Servants Conduct Rules of 2001/1944 A.D., revised, sanctioned and issued under SRO-47 of 1971, dealing with the public demonstration in honour of Government Employees, Criti-

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cism of government and also with regard to demonstrations and strikes by the government servants. It also lays down rules with regard to the position of an employee towards subscriptions to associations, lending and borrowing money, unauthorized communication of information and his connections with Press and Radio.

The State, in its administration provides a dichotomy, not in the sense of control but in the sense of geographical position of the three regions. The Jammu province has a separate identity and Ladakh represents another unit and the Valley excluding Gurez and Karnah as separate cultural identity. In its administrative control in rural areas usually a village is a basic unit and in urban areas a Mohalla, however, the patwar is a basic local area. These local areas have been demarcated on geographical contiguity. The Patwar being basic unit, with the Niabat as a conglomerate of patwar and the tehsil as a sub-district and then three regions representing as three Divisions each with a Divisional Commissioner as the controlling authority. Finally, at the top level you have the government of the secretarial level.

In the post-1947 Administrative design expansion is a constant feature but there is little improvement. During the era between 1947 to 1953, over centralization under the leadership of the National Conference was the rule. The administration was effective but non-democratic. During the period 1953-1964, the administration remained in the hands of Bakshi Ghulam Mohammad, comparatively the ablest but steeped in corruption. The special feature of Bakshi's administration was quick decision-making. The administrative set up during Shamasuddin's regime failed miserably. After Shamasuddin it was democratized by Ghulam Mohammad Sadiq but lost its effectiveness. Qasim's administration retained the status quo in relation to his predecessor. The Sheikh's administration was very effective in the beginning but later slipped into its traditional lethargy, corruption and outwitted Bakshi's regime.

The above pages reveal that from time to time the rules were framed to regulate the recruitment, promotion, demotion, dismissal or reinstating, training, discipline and pay scales of the public servants. However, N. Dean, in a booklet entitled, "The Curse and the Political Catastrophe of Kashmir" comments, "The Civil Administration lost what little virtue it had before 1947. The emotional ordeal began after a short pause. Nobody had the power to speak or open his mouth against its abuses and other abominable features which upset everything." We find during the last six decades indignation and outcry against favouritism in recruitment, undue promotion, official immorality and red tape rampant in the administration. When it suited the bureaucracy the posts remained vacant, otherwise favourites were appointed if available. Bureaucrats, especially the Secretariat, have secured all favours for them and help each other controlling from top to the bottom. Dedicated, diligent and young I.A.S. officers on deputation from Central Government had usually to run away owing to maladjustment in the administration in Kashmir and those of the officers who adjusted, made money and went back with financial security. Dedicated civil servants in the gazetted and non-gazetted cadres were never encouraged, with the result that sychophants got pushed to higher positions, rendering the whole administration inefficient. Politics rather than constitution and ethics regulate the behaviour of civil administration in Kashmir.

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CHAPTER XI

POLITICAL PARTIES

Party system, an extra- legal and extra -constitutional growth, is the very soul of democracy. A party as such, is not provided or created by a constitutional or any law established by a state. It grows by itself- it has grown in England as well as in India by way of tradition. Without political parties, democracy can degenerate into totalitarianism. Political parties and democracy are compatible - they go together and may die together. According to Samuel J. Eldersveld a political party, "is a social group, a system of meaningful and patterned activity within the larger society. It consists of a set of individual populating specific roles and behaving as member actors of a boundaried and identifiable social unit. Goals are perceived by these actors, tasks are assigned for and by them, and communication channels are maintained." However, the same author sums up some responses to queries about political party or parties and provide some explanations:-

(a) "Political parties are too narrow an interest - they are mostly interested in getting into power, in getting people into office."

(b) "Parties are not really interested in local problems

and in issues."

(c) "Parties are weak compared to other groups –there's a better chance for success in other groups – there's less criticism and opposition in other groups."

(d)"It is difficult for an individual to have much say in a party with bosses running the show."

(e) "I would not want to commit myself to any one party- once you do, you are stuck –it might be a dead end."

(f) "Party work is tedious, uninspiring, and it takes too much time."

(g)"both parties are petty much the same –there is no difference in what they stand for."

The generalizations may be peculiar to the American system or to any other system in Europe; they cannot be applicable to the State of J&K. However, certain similarities do exist. To Kashmiris politics by itself as Manzoor Fazili puts it, "In effect, the Kashmiri in his folklore projects politics as nothing but 'yeeravan-naav' or anarchy." True to this tradition and attitude, we find that until 1947, the people of the State had to experience politics of slavery only, except when a political party emerged in 1932 it fixed certain set political goals. The political party which emerged in 1932, under the name of All J&K Muslim Conference, only in 1939 converted into the All J&K National Conference claiming to uphold the tradition of secular character of the nation. Consequential upon it the All J&K National Conference dominated the political scene of the State from 1939-1947, under the leadership of late Sheikh Mohammad Abdullah. It's character during the period was the party fighting or struggling for freedom from the despotic rule of Dogras.

The constitution, brought up-to-date, by the National Conference in 1944, in its first article spelt out the aims and objectives of the organization. It laid down that the party shall endeavour to establish, "a democratic government in

the State in accordance with the principles of the economic planning envisaged in the Naya Kashmir." In the economic programme of Naya Kashmir State control was envisaged over agriculture, industrial production, distribution of national wealth and State direction for the improvement of education, health, labour, cooperatives and culture. Equipped with the constitution, the conference leaders impressed upon the people- both by their ideas and deeds – that they were fighting for the high ideals of establishing democracy and socialism after seeking power and abolishing despotic rule in the State.

The government of Sheikh Mohammad Abdullah and the National Conference came into existence at a crucial stage in Kashmir history in 1947. At first, the Sheikh established an emergency government and later a stable ministry. The ministry had to take steps towards implementing the avowed policies of the organization. These promises made to the people by the National Conference before 1947, and implemented in post 1947, are summed up by Manzoor Fazili as follow:-

1. Abolition of Zamindari was preceded by the withdrawal of the Jagirs which the Dogra rules had granted to some privileged people.

2. Grazing tax was abolished.

3. The earlier governments had introduced the system of Mukararies and Maufidars. Under it revenue on some lands was collected by, or handed over to some individuals as a right. The people's governments immediately abolished Mukararies and Maufidars.

4. Chenani, a Jagir in Jammu province, a legacy from the medieval feudal times was abolished as a Jagir and amalgamated with tehsil Udhampur.

5. Tenancy Act of 1980 (Bikrami) was amended twice (2005 and 2006 Bikrami) to protect tenancy rights. Conse-

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quently, no tenant could be ejected from the lands by a landlord. The landlords could claim only one fourth of the produce from tenants in case irrigated land exceeded twelve acres, and from un-irrigated land only one third of the total produce was due to the landlord.

6. In Kashmir tenancy rights were protected upto the extent of two acres of irrigated land upto four acres of non irrigated area for each family. In Jammu province the rights of the tenants were protected up to the extent of four acres of irrigated land, eight acres of non irrigated one.

7. All functionaries of the type of numberdars, zaildars, mansabdars, etc were abolished and a new cadre established whose appointment was by election.

8. Abolition of debts contracted under the Sahukari system.

9. All land distributed under any scheme were granted to the tillers without compensation.

Thus, the two phases of the National Conference one from 1931-1947 and the second from 1947-1953, were formative and operative respectively. Naturally, the formative phase was honest, un-opportunistic, without struggle for power and above all populist. The second is dishonest, opportunistic, marked by the struggle for power, particularistic and above all without popular appeal. Consequently, the N. C. as Dr. Karan Singh and others agree, had a split in the organization, which led to the fall of the Sheikh in 1953. After the arrest of Sheikh Mohammad Abdullah on 9th August 1953, Bakshi Ghulam Mohammad snatched the reins of the National Conference from the Sheikh and took them in his hands. By the end of 1964, Mr. Sadiq had not only taken over the reins of the N.C. but many distinctive changes had occurred in centre state relations. The most important was the constitution (Application in relation to J&K) amendment Act under which article 356 was extended to the State

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of J&K. Accordingly, the National Conference was converted to the Congress and Jammu and Kashmir Pradesh Congress was affiliated with the Indian National Congress. The third phase of the N.C. from August 1953 to 1964, under the leadership of Bakshi Ghulam Mohammad and G.M. Sadiq, was stagnant phase of the organization. The party had no public appeal and as a matter of fact was almost unpopular. Its resurrection however, took place in 1975 under the leadership of Sheikh Mohammad Abdullah, which can be treated the fourth phase of this organization. The resurrection of the National Conference, in its fourth phase, was erected on the dead body of the Plebiscite Front under Mr. Beg's leadership. The Sheikh only remained its patron. When the Sheikh concluded, what is known as Sheikh Indira Accord, the need was felt of changing the nomenclature of the Plebiscite Front and the National Conference was preferred.

The National Conference, from 1975 to the death of the great Sheikh remained distinctive and dominant in State politics as the same organization remained important during the years before 1947. Its distinction is attributable to the charisma of Sheikh Mohammad Abdullah. Some writers and political analysists believe that the Sheikh was the N.C. and the vice versa. The future shall decide whether the statement turns true. However, in the fourth phase, people gave full mandate to the National Conference to govern and legislate under 1977 elections. These were first, free and fair elections in the State, though the first was conducted in 1951. All earlier elections were fraud, rigged and one sided by all cannons of morality, according to opposite parties.

The National Conference, in all its phases, stood for secularism, socialism and democracy. It is assuredly the same organization who took the historic decision to support accession of J & K state to India and abolished Jagirdari system in the State, in the course of the furtherance of its secular and socialist attitude. To foster and perceive democracy,

it is the organization which gave the constitution of J&K to the people of the State. When the National Conference fought the elections of 1977, it explained and promised the people the following in their party manifesto:-

"The clarion call sounded by Jenabi Sheri-i-Kashmir as early as 1935 in respect of political, social and economic development of the State may be put in his own words: they are: "my fight is for emancipation of my country. Let us all rise above all petty communal bickering and jointly work for the welfare of masses. I appeal to my Hindu brethren not to entertain imaginary fears and doubts. Let us assure them that their rights shall not be jeopardized if they join hands with Muslims of Kashmir." Equally resonant are the words spoken by him in the introduction of New Kashmir, the programme of socio-economic and political emancipation adopted by All Jammu and Kashmir National Conference in the year 1944 which for their historic importance and equally important relevance today can bear repetition here. They are "the National Conference envisages the future of New Kashmir in both political and economic terms. Towards that end we have drawn up a scheme which politically is based on democratic principles applied from local panchayats right up to the National Assembly. This is linked with the independence of judiciary and ultimate responsibility of the executive to the people. In the economic sphere we have gone on the principle that planned economy is the essence of progress and that without it, there can be no raising of standard of living of the masses of the State. In our New Kashmir we shall build again men and women of State who have been dwarfed by centuries of servitude and create a people worthy of our glorious motherland."

"Having set these ideals before itself J&K National Conference under the leadership of Sher-i-kashmir has marched on the path of struggle to achieve the ideals and win for the State's people a place of prominence, honour, and dignity

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in the republic of India. The party won for the people the right to have its own constituent Assembly, its own constitution, as distinct unit of their great country's democratic federation. Never has this ideal been removed from their vision, despite the dark clouds of suspicion and doubt that occasionally came to be cast by self seeking and opportunist elements present in the body politics of the State and the country. This was being reiterated not with a wave to bring to the force the past misunderstanding but only to put in proper perspective the issue that dwell in the popular imaginations and in whose context the State is going to the poll in coming State Assembly elections. These are more important today when election have come to be called for in the backdrop of new national situation when Congress Party holding power for nearly thirty years of independence was not returned to power by the people."

"In post independent India, All J&K National Conference led the people in the battle defining State's relationship with the Union of India after the instrument of accession was endorsed for matters of defense, foreign affairs and communications. Consistent with the demands of the situation and the democratic sovereign rights of the people of our State, Art 370 of the constitution found its place in the country's Constitution especially for the State of J&K. In the year 1952 historic Delhi Agreement was brought into existence as a result of negotiations between Shiekh Sahib as leader of the National Conference and Prime Minister of State and Pt. Jawahar Lal Nehru, the then Prime Minister and leader of the Congress Party for purpose of further defining and shaping relationship of the State with the Union of India. Unfortunately, continued efforts to erode Art 370, was to violate letter and spirit of these solemn agreements and came to be made from time to time by anti-people forces. The National Conference stood fast by the agreements in the formulation of which assiduous and painstaking efforts had been exerted by the party under the leadership of Sheikh

Sahib. When it was found that the party and its leader were standing fast and true to their pledged word and needs of the people and their future, political opportunist and self seekers staged a coup detat on 9th August, 1953, when all principles were thrown to winds. The leader of people and State as also the Prime Minister of the time was unconstitutionally dismissed from the Prime Minister ship of the State and clamped in Jail with hundreds of his comrades. The story thereafter is very recent history and may not be repeated except to place on record that Sheikh Sahib and his compatriots suffered incarceration for the courage of their convictions. The people were denied their rights, and subjected to humiliation but they remained unbent and unbroken particularly in their loyalties to their leader Jenabi Sheikh Sahib and the cherished values of the democratic freedom movement led by him and his party, All J&K National Conference.

"The stiff resistance offered by the people, the acute political pressure resulting from determined people's opposition to misrule by the Congress brought a realization in the ruling circles at Delhi that task begun by Punditji for settling the Kashmir tangle should be restarted from where it had broken. Smt. Indira Gandhi as Prime Minister of Union of India undertook to initiate negotiations with the leader of the N.C. After protracted and difficult negotiations, in which Mirza Mohd Afzal Beg also participated in no small measure an accord was arrived at in late 1974. Sheikh Sahib accepted the gesture of the Indian Prime Minister in the earnest hope that it would break ice in Kashmir's political stalemate. The Accord was finally signed and power came to be transferred to Sheikh Sahib to become Chief Minister of J&K, not however, without reservations since power for people's welfare had to be exercised in the context of a legislature mainly manned by nominees of the Congress Party that had voted itself to power through internationally discredited

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electoral processes and that too when leadership of the people of the State was either in exile or subject to a legal ban prohibiting participation in the elections. Even so Sheikh Sahib assumed power in a spirit of faith and with an earnest desire to serve the people and clean the debris to which State's economy and administration had been reduced by Congress misrule for over 13 years, but not without a warning which he sounded in the following resonant words as early as August 23rd, 1974, in the course of his communication to Shri Parthasarthy, "Appropos to our talks yesterday and the day before, I hope that I had made it abundantly clear to you that I can assume office only on the basis of the positions as it existed on 8th August 1953. With regard to the provisions of the constitution or the union laws and entries applied to J&K State after 9th August, 1953, judgment there upon will be deferred , 1975 but for the plea of emergency raised by the then rulers in Delhi. The elections had to be held back because Congress party pleaded that they were facing difficulties and were not prepared for it. Let us however, not keep out of our mind this important context for the State elections now facing us."

"As premier political party of the State, we have to our credit implementation of revolutionary program of abolition of hereditary rulership, abolition of big landlordism, liquidation of rural indebtedness, convening of people's constituent Assembly, creation of the population organs of power and introduction of concept of planned economy for the first time in the country."

"All J&K National Conference has throughout its period of struggle been informed in its onward march by principles of moral uprightness in words and deeds and shall ever consider that peaceful, non-violent, and democratic and morally sound means should continue to inform their actions and receive prior attention. National Conference has striven and shall strive for peace in the world. In Indo-Pak

relations, the party has striven and shall strive for success in building peaceful bilateralism in the interest of peace and mutually beneficial trade relations."

"Despite our consciousness of having acted in the manner indicated above for the sake of building model State of J&K, we realize and recognize that the present calls for greater dynamism, clearer ideological vision, militant work of consolidation to win for the people through a time bound programme a life of plenty and prosperity as also dignity. To achieve this at a quicker pace, our party shall, if voted to power, earnestly endeavour in a spirit of dedication to achieve and ensure for our citizens:-

(a) Right to work for every able bodied person;

(b) People's plan with intensive job-orientation in each district for ending unemployment amongst educated and uneducated unemployed youth;

(c) Old age pension and national security plan for the sick, infirm and disabled persons;

(d) Equal rights to work and pay for all without discrimination of sex, caste, religion or region;

(e) Special plans with higher financial targets for far flung hilly areas;

(f) State's health scheme for easy medical relief;

(g) Supply of clean drinking water in all parts of the State and implementation of a plan to ensure this within shortest possible time;

(h) Abolition of the evils of dowry and other such ills in our social life;

(i) Protection to the right to be governed by one's own personal law and development of all regional languages and culture;

(j) Electrification of all parts of the State during the next

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two years;

(k) Improved and assured irrigation for increased production in concerned fields of economy;

(l) Planned economic development in industry, both large-scale as well as small scale inclusive of cottage and the handicraft sector to instill and create sense of involvement and participation in building the State as model for the country.

(m) Development of the fruit industry and tourism and all timber based industries on the widest possible scale:

(n) Speedy agrarian reforms and implementation of agrarian reforms Act and providing law to landless:

(o) Stoppage of ejectment processes from lands below two acres of abi land or three acres of khushki land of landless people who have no other source of living except this land;

(p) Review of the transport policy to make it beneficial to the transporter and the State;

(q) Examination of the recovery processes of loans to the farmers or petty traders;

(r) Higher pays to State employees to create opportunities for their contented life in service and in old age;

(s) Increase dearness allowance and other amenities according to the central scale and dispensation in gradual and phased manner within shortest possible time;

(t) Special housing projects for low paid employees and backward classes, scheduled castes and weaker sections of society and Nomadic tribes;

(u) Preference for permanent residents of State in the matters of recruitment for higher services and in this context provision for encouraging local talent and expertise;

(v) Special plan for children and youth for their help,

education and recreation on widest possible scale;

(w) To ensure proper exercise of fundamental rights of speech, association, movement, conscience, as guaranteed by the constitution and in this context to aid and assist forces for removing undemocratic provisions of the Indian constitution;

(x) To end corruption in public life at all stages and provide clean administration;

(y) Quick implementation of directive principles of our constitution in the matter of building a socialist agrarian economy, public sector industries and cooperative institutions for production and supply of essential commodities at cheaper prices;

(z) National conference shall seek permanent settlement of refugee problem and get it expedited by the central government."

At the end of the manifesto the National Conference promised to dedicate herself to the task of building Naya Kashmir with redoubled energy and abiding faith in their people. It was on the basis of this manifesto of the N.C. that the Sheikh and his party got a thumping majority in the State legislature. Legitimacy was granted to all that the Sheikh had testified or agreed to testify after 1953. The N.C remained in the glory of power until his death in September 1982. Before his parting, however, he had bequeathed the organization to his son, Dr, Farooq Abdullah. After his entry into Council of Ministers with Health portfolio, Dr. Farooq Abdullah became the State Chief Minister on the death of his father on September 8, 1982. The State Chief Minister secured the dissolution of the State Legislative Assembly in May and elections to it were held on June 5, 1983, securing 47 members in an Assembly of seventy-six membership. The results, however, as A.N. Dar had predicted, went diverse ways in Jammu and in the valley of Kashmir.

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From Jammu Congress (I) was returned whereas in the valley an absolute majority was secured by the N.C, commenting on the election results the editorial of the Indian Express of June 11, 1983 wrote:

"Farooq Abdullah has carried the day and established the continued supremacy of the N.C. In J&K after a hard fought, acrimonious and sometimes violent election charged with rival allegations of manipulation and official bias. Yet when everything is said, the popular mandate is beyond doubt. Sheikh Abdullah's mantle has truly fallen on his son who owes no thanks to any favors from any quarter. The Chief Minister will be his own man. This factor, combined with the comfortable majority behind him, not without a regional spread, should ensure a stable administration after the somewhat destabilizing effect of some aspect of the poll campaign. The State has seemingly divided on regional and even communal lines."

As a consequence, the first phase of formation of a new Council of Ministers for J&K, eight ministers, headed by the Chief Minister, Dr. Farooq Abdullah, were sworn in at Raj Bhavan in Srinagar on Sunday, June 12, 1983. Dr. Farooq Abdullah had good start— — immediately after swearing in ceremony as Chief Minister he had become composed. In his speech at Iqbal park, according to A.N. Dar of the Indian Express , he was well composed, an essay in sobriety and good politics. On the very day after taking over as the Chief Minister he said, "we will extend our hand of friendship for the Centre to grasp it. If they do not grasp it, we will still keep it extended." Though the N.C manifesto mostly encash on the charisma of the late Sheikh, yet in their thirty one point programme it dedicated itself to the task of building Naya Kashmir.

The National Conference and its undisputed charismatic leader Sheikh Mohammad Abdullah, during the last half century, dominated the politics of the State. The dominance

was not felt only by the opponents of the party but even the people outside the State. Not only was the Sheikh recognized as tallest of Kashmiris by the Indian leaders but even the leadership in Pakistan and Azad Kashmir recognized him as the undisputed leader of the Kashmiris. The Press and other mass media in England, on his demise, gave him tributes of an international leader. During his life time, the National Conference was the Sheikh and the vice versa. Whenever, this organization existed without the Sheikh, it had no soul. The policies of the Sheikh as the leader of the N.C were always directed to uphold the cause of Kashmiris for self-identification and self-recognition. Inder Malhotra examining this aspect of the Sheikh's life says;

"but the emphasis on Kashmir being an entity separate from both India and Pakistan was unmistakable. In later years, the concept of the Kashmiris being a quom (nation) became a virtual litany in the Sheikh's speeches which would be punctuated frequently with the slogan: "Yeh muluk hamara hai: Iska faisla hum karengay" (this is our country and its future will be decided by us).

The National Conference and its leadership is criticized on many grounds by its opponents. Some believe that the conversion of the Muslim conference in 1939 into the National Conference was the first treachery of its leadership towards its muslim brotherhood, as it resulted into Kashmir's accession to India in 1947. In 1975, the conversion of the Plebiscite Front into the National Conference is yet another grave mistake committed by him according to others. Some of Sheikh's fans believe that the only mistake committed by him is the acceptance of power in 1975. According to them he should have ruled from a distance rather to be in the chair. The Indian's including Kashmiri intellectuals and elite consider him a complex personality with terrible contradictions. The usual comment on the Sheikh from these circles has been that he was a communist in Delhi, a nationalist in Jammu

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and a communalist in the valley. The tragedy of the Sheikh since 1947, was that he was dubbed a pro-Pakistani when he said or did something favoring Pakistan and a pro-Indian when he favored India for any cause. Thus when he was pro-Indian, he was an enemy of Pakistan and vice versa. Whatever he was, he was a complex personality, assuredly representing and manifesting of the complex Kashmir identity and personality.

The next political party known to the people of J&K since 1964, is the All India National Congress. During late Nehru's time, the All Indian National Congress treated the All J&K National Conference as its wing without renaming it. Later, however, during Sadiq Sahib's Chief Ministership, the Congress Party was inaugurated by converting the All J&K National Conference into All J&K Pradesh Congress, making it a subordinate wing of all India National Congress. This All India National Congress owes its origin to A.O. Hume, a retired Secretary to Government of India. Its leaders issued its first manifesto as early as March 1885. It is the party which made Indians conscious to fight for the independence from British Rule. The party is the ruling party at the Centre since the independence of India and in Parliament up till general elections in 1967. Its policies and basic ideology continued to be, since its inception, the establishment of secular, socialist and democratic society in India. Whatever changes were brought in its organizational pattern of the party since 1947, relate only to methods and operatives of its policies rather any change in its basic policy or ideology. The new constitution of the Congress Party, adopted in April 1948, defined the Congress objective as, "the well being and advancement of the people of India and the establishment in India by peaceful and legitimate means of cooperative commonwealth based on equality of opportunities and of political, economic and social rights and aiming at world peace and fellowship."

The Indian National Congress in 1961, emphasized the programme of national integration, socialism through mixed economy, vitalization of a village life through Panchayat Raj and cooperative organization. The working committee said, the objective of a socialist society to be realized through democratic and peaceful means is an objective compatible with the need for rapid social and economic progress in India, maintaining at the same time the moral and ethical values to which the Congress has always attached importance and represent the spirit of India's struggle for freedom and is in line with the genius of her people." The 1967 election manifesto of the party reiterated its deliberate choice in favor of an open and democratic society. It proclaimed democracy as the way for Indian life and emphasized not only its central concept of political equality but also its equalitarian implications in social and economic fields. In foreign relations it continued with the principles laid down by Nehru which aimed at peaceful co-existence, non-alignment, non-intervention in internal affairs, and opposition to colonization and devotion to the United Nations. However, in 1967 elections Congress majority in the Lok Sabha was substantially reduced, and it lost majority in a large number of State Assemblies. The Congress during 1967-70 had to face split which reduced the Congress image in the country. The split, however, did not mean any fundamental change in its ideology - it was clash of personalities. During this period organizational Congress (Congress O) tried to form anti government front and the Congress lead by Mrs. Indira Gandhi moved closer to communist party of India. While alignment and realignment of political forces was taking place, Mrs. Indira Gandhi advised President V.V. Giri to dissolve the Lok Sabha and hold mid term poll. When the elections were held according to schedule, Mrs. Gandhi's Congress got absolute majority. She won 352 seats in the Parliament as against the strength of 283 in 1967 elections. Mrs. Gandhi's Congress also recaptured power in State Assemblies. When

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the elections for the State Assemblies were held in March 1972, the State of J&K Legislative Assembly was able to get a representation of 57 Congress members, in a house of 75 members. There were nine members elected to the Assembly as independents and five belonged to other parties. The Jana Sangh which had a base in Jammu province, prior to 1983 elections, could secure only three seats. Syed Mir Qasim was elected the leader of the majority and consequently assumed the charge of Chief Minister in the State. The most of the people in the State of J&K, acknowledge it for certain that election to the State Assembly right from 1953 up to the elections of 1977 were rigged and false.

When Mrs. Gandhi secured absolute majority in mid term poll and stabilized her position in states in the elections of March 1972, she was in a position to review her domestic as well as external affairs. With a fresh look to the domestic problems she initiated a dialogue between Sheikh Mohammad Abdullah and the Plebiscite Front leadership on one side and on her own side made Parthasarthi to settle what is termed as centre-state relations. During this time, the Plebiscite Front in the State had also reviewed the national and international situation and its bearing on Kashmir in the light of the conflict between India and Pakistan in which Pakistan lost its east wing, now Bangladesh. Consequently, an accord was concluded between Mrs. Indra Gandhi and Sheikh Mohammad Abdullah in 1974. Syed Mir Qasim, as Congress Chief Minister, stepped down from the Congress Ministry in the State. Sheikh Abdullah ministry of 1975, consisted of four members and was supported by the Congress in the State Assembly till its dissolution in March 1977. By the time election to the State legislative Assembly in June 1977 were held, Mrs. Indira Gandhi and the Congress party had lost her power in the centre. The Janata party had assumed power in the centre. Consequently, when elections to the State Assembly were held in June 1977, the

Sheikh and the N.C was able to capture 49 seats in an Assembly of 76 members. The Janata party secured thirteen and the Congress only ten. Most of the opposition in the Assembly was elected from the Dogra power base in Jammu province. However, in the elections of 1983, the Congress (I) secured twenty-six seats in an Assembly of seventy-six seats. The Congress (I) had shown spectacular results. It had more than doubled its strength from 11 seats in the dissolved assembly to 26 seats in the Assembly of 1983. The twenty-six seats included three from Kashmir and Ladakh and 23 from Jammu. In the percentage of votes cast in favor of the Congress, it defeated most of the parties in Jammu and improved in the valley as compared to 1977 elections.

The Congress as a political party is not making a headway in the valley. The reasons are well-known. Since the accession of the State to India in 1947, while mostly Congress domination at the centre, its leadership had many lapses in dealing with the affairs of the State. Consequently, the most of the Muslim power base looks at it with suspicion. The suspicions are deep rooted. Some consider accession to India as a Congress manipulation based on intimidation and fraud. Still others consider denial of democracy to the State uptill elections of 1977, that too under Janata government, to have been caused by the Congress. The misuse of Central grants-in-aid and other financial assistance by the State Congress leadership to be another reason, for Congress dislike. The Shiekhites consider the arrest of Sheikh Mohammad Abdullah in 1953 as undemocratic and accordingly its responsibility is attributable to the Congress. The long internment of the Sheikh by the Congress government since 1953 up till 1972, is highly suspicious according to some. They have lost faith in Indian democracy. The communalism in other parts of India in particular, Assam, Aligarh, Moradabad, Lucknow, Delhi and elsewhere has compulsions for some to refuse to consider India a secular State. There is,

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however, a need to change the position. The Congress (I) may still improve its position in the State if Pt Nehru's following words are shaped in practice:

"The strongest bonds that bind will not be of your armies or even of your constitution to which so much of reference has been made, but bonds which are stronger than constitution and laws and armies — —bonds that bind through love and affection and understanding."

The political party usually known as J&K Awami Action Committee is not a State level party but a local party confined mostly in the municipal jurisdiction of Srinagar. It is associated with the name of Mirwaiz Mualvi Mohd. Farooq. Mirwaiz (chief preacher) is a type of a religious personality or chief clergy man. Since 1931, this personality has assumed sometimes partly and other time fully, the role of a political leadership. Though it is not fundamentalist in combining politics and religion together, yet religion was politicized by the Mirwaiz many a time. Its leader Mirwaiz Maulana Farooq, was the scion of Mirwaiz family of Kashmir. The family is reputed for learning, preaching and piety of its members. They have played both religious and political roles in the affairs of Kashmir. Late Mualvi Mohammad Yousuf Shah, one of the scions of the family played a notable part in the affairs of the State. He remained President of the Muslim Conference, founded in 1931 to struggle for freedom in the State. He lived his life in exile, since 1947, till his death. He was a rebel against what he called Indian hegemony on Kashmir through 'fraud and violence'. Mirwaiz Mohamad Farooq, born on 14the December 1944, took honours degree in Arabic and was accredited to religious priesthood as Naibi-Mirwaiz (Vice Preacher) in 1962. The ceremony was performed at the behest of Late Bakshi Ghulam Mohamad Prime Minister of J&K following the death of Maulvi Farooq's grandfather Maulvi Atiqullah. He continued to be only a religious preceptor uptill the disap-

pearance of the holy relic from the Hazratbal shrine (December 1963) which brought him into the vortex of active politics. He soon became the head of the Action Committee, which was to channelise the sentiments of the people who protested against the theft. The Committee acted as a united front, comprising all political and religious parties and organizations, which guided the masses as to the acquisition of the sacred relic. At this juncture of the history of Kashmir, the leadership of the Plebiscite Front was under detention. According to the Secretary of Awami Action Committee, the agitation in connection with the sacred relic soon became one for the vindication of the peoples demand for the right of self-determination. The Maulvi spearheaded the movement and a historical resolution to the effect of securing of plebiscite was passed on 17the march 1964 under his Chairmanship. Following 1965 Indian Pakistan conflict he found himself in detention having been arrested on 10th of October 1965.

He was held for more than two years and released on December 20, 1967. He headed the Awami Action Committee which was the direct consequence of the Action Committee to secure sacred relic. The Action Committee had a limited objective but the Awami Action Committee is a political party. The Maulana was not only chief religious priest and Chairman of the Auqaf (A religious trust) committee appointed for the management of the famous Jamia Mosque of Srinagar. He was also the President of the Anjuman Nasratul-Islam, a premier Muslim Organization devoted to the promotion of the cultural and educational interests of the Muslims of J&K. On December 7, 1968 when Hazrat Mirwaiz Mohamad Yousuf Shah passed away at the age of 75 in Rawalpindi, the 24 year old Naib Mirwaiz Mohammad Farooq became the Mirwaiz of Kashmir and for the second time in six years the ceremony of dastarbandi was confirmed on him at a gathering in Jamia Masjid in Srinagar. He was

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assinated by unidentified gunmen on 21st May, 1990.

The objectives of the Awami Action Committee in general is islamization in the State of J&K, both by imparting religious education and settling of the Kashmir problem politically. According to the party the accession of the State of the union of India is involuntary -Maulana said that world knows that the accession was provisional. According to the committee Pakistan is a party in the dispute over Kashmir. Consequently, it is of the opinion that the dispute should be settled in accordance with the provisions of the various resolutions passed by the U.N.O. They feel that the commitments made by India and Pakistan towards the people of Kashmir should be fulfilled. However, bilateral negotiations between India and Pakistan is considered to be a solution by the party. The party considers elections and plebiscite two different concepts according to political science and hence desire to delink them. It, consequently, denies Kashmir's special status under Indian constitutional framework. The party, ultimately raises the same slogan which the Plebiscite Front and the N.C. (from 1975-1977) shouted often: "This is our country we shall decide its destiny." According to the Maulana, the then leader of the party, the only way to settle the Kashmir tangle was to hold the promised plebiscite-- to him it was just, peaceful, democratic and in accordance with the realities of the State.

The Awami Action Committee, however, faces its own contradictions. In 1977, it associated herself with Indian Janata Party. While Moraraji Desai was the Prime Minister of India, he visited Kashmir during election campaigning and was received by the Maulana at the Mirwaiz Manzil in Srinagar. He was received at his residence with a traditional gaiety amidst the folksongs like,

"Pakistanuk maharazi auo": (A groom from Pakistan is welcomed) and so on.

The Awami Action Committee, however, was not acceptable to the people in the valley in 1977 under the name of Janata. The valley provided only one seat to the party and the N.C was returned to power with absolute majority. In the elections of 1983 Mirwaiz, while reiterated his earlier stand on Kashmir problem, supported the N.C., which considers the accession issue to have been settled once for all. The party is localized in a small area of Srinagar city and its leadership has never been able to make any membership beyond its own committed votes. It has no political future. Even as religious leadership, the party is not known beyond its 'bakra' belt in Srinagar extending from Tarabal in Nawakadal on both sides of the Nallamar upto the Jamia mosque. The grass -root level of the party is too weak to be considered, even in its own areas.

Most schemes for identifying types of parties suggest, broadly, three categories: doctrinaire, organizational and functional. At the very outset the Jamat-i-Islamia J&K and its youth wing Jamait -Tulba suggest that it is a doctrinaire in essence and purpose. The Jamat places a high priority upon the nurturing and the propagation of specific ideology and value system of Islam. The Jamat in its constitution decline to present itself as an electoral and parliamentary group in its origin – yet it functions on the elections as an electoral group by way of proxy. Originally Jamat had an approach for propagation of its ideology based on educative process. The constitution of the Jamat is in force since 1953, and as amended by it on 9th and 10th May 1969, in its section 3, it refers to its ideology. Factually, the Jamat started functioning in the early 1953, with a small possible membership alongwith certain sympathizers. The party asserts to operate Islamic fundamentalism if and when in power. It declares politics and religion to be one and the same. Consequential upon it, capture of power means for it retention and extension of sovereignty for the service of man towards

his fellow-being. The constitution, in its first article says that there is none but Allah who is helpful, benevolent, and merciful and in whom men can wait for the solution of their mudane problems in this world. The main objective of the Jamat is the establishment of Islamic State and the method through which this goal can be achieved is provided by the constitution as under:-

(a) all party decisions shall be subject to the tenants of Islam.

(b) None of the decisions or actions shall be in contravention to morality, truth and honesty.

(c) The Islamic revolution shall follow a constitutional and democratic norms.

(d) The Islamic message shall be placed and propagated before all irrespective of caste, colour, language, community and place of birth.

The Jamat from 1953-1967 did not emerge as a political party but in 1967, it decided to contest both in the local bodies and the State legislature. The Jamat leaders assert that they could not contest in local bodies elections in 1967, as they were placed under detention. However, in mid term poll to the Indian Parliament in 1971, the party contested four seats – Srinagar, Baramulla, Islamabad and district Doda. The nomination papers of their Srinagar candidate were rejected by the election authorities and in other constituencies the party could secure no seat. In 1972 State Assembly elections, the Jamat fielded 22 candidates but could return only five seats in the legislature – one from Baramulla, two members from Islamabad and two from district Srinagar. After the accord of the Sheikh with the centre, elections to the State Assembly were held in 1977, in which Jamat could secure only one seat from Sopore – the seat was won by a marginal majority of 33 votes only. The elections to the State legislative Assembly on June 5, 1983, the party was routed

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and the National Conference under the new leadership did not concede any seat to the party.

In the elections to the State legislature in 1983, the opposition parties to the Jamat, in particular Congress, brought to the forefront the contradictions of the party. The Congress labels it as a communal party and consequently condemns its militancy declaring it unsuited to the tradition and temper of the people of Kashmir. According to them, the party is subject to its contradictions. On the one hand, the Congress claims, Jamat treats India as usurper of Kashmir and on the other hand they contest elections under State and Indian constitution. According to them, the Jamat legislators so far took oath or affirmation according to the form set out for the purpose in the fifth schedule bearing true faith and allegiance to the constitution of the State as by law established. They (Jamat legislators) according to the Congress leaders talk against secularism and socialism avowed faith and objective of the constitution of India but at the same time take an oath to defend and uphold the sovereignty and integrity of India. The Congress criticism against Jamat in the elections of June 1983, was very severe. The Congressites asserted, "on the platform they declare that the western democracy, its methods of election, its grant of rights and duties, Indian secularism socialism and democracy are alien to Islam —on the other hand they demand right to self determination for the people of the State and enjoy all fundamental rights under the Indian constitution— they are enemies within a system and in behavior unislamic."

The next party, fighting for its recognition and power, was All J&K Peoples Conference with Mr. Abdul Gani Lone as its Chairman. The Peoples Conference is sub-local party and is trying to emerge as local party at least in the valley. However, the leader of the party, a defector, before founding his own party is trying to create personal charisma. According to the party commitment, it is claimed that the

party originated as a reaction to the Sheikh-Indira accord of 1975 which buried the right of self determination for all times to come. The party literature treats it as the tragedy of the year 1975. According to them every Kashmiri questions the legitimacy and validity of the accord and treats the Sheikh's twenty two years of struggle for the right of self determination as wastage. To them, the Accord had confirmed the loss Kashmiris had undergone after 8th August 1953 through constitutional erosions. As a reaction to this accord whereby internal autonomy was bartered the party was founded on September 6, 1978 and Mr. Abdul Gani, an M.L.A. representing at the time from Handawara constituency was elected as the Chairman. A committee to draft the constitution for the organization was appointed under the Chairmanship of Mr. Muzzaffer Hussain Beg. The constitution recommended by the committee was later adopted by the general council of the People's Conference. In its manifesto the party promised to the people of J&K, in the elections of 1983, as follows:-

(a) struggle shall continue for the internal autonomy in accordance with the provisions of the instrument of accession as entered into between the Maharaja of Kashmir and the Government of India on October 26, 1947;

(b) fundamental rights shall be made part of the constitution of J&K and State legislature shall review the jurisdiction of election commission;

(c) no non State subject shall be permitted to purchase land and settle on the soil of the State;

(d) all false State subject certificates shall be cancelled;

(e) non State subjects shall not be provided employment in the public offices, instead the State subjects shall seek more employment avenues in the Central governments;

(f) the Central government shall be prevailed upon to allot posts both technical and non technical, for the State

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subjects;

(g) backward areas shall be represented in services proportionately;

(h) State administration, judiciary, financial accounts, engineering and health services shall be established. The central services shall be removed and State services to be encouraged;

(i) national wealth shall be equally distributed and social justice shall be operated;

(j) communal harmony and brotherhood shall be encouraged;

(k) a clean administration shall be aimed at absence of corruption and exploitation;

(l) red tapism, undue political interference shall be eradicated, officers shall be accountable for their actions;

(m) State officers shall receive encouragement by providing them all immunities;

(n) the judicial system shall be made effective by either withdrawing or settling such criminal cases which are pending in the courts for more than two years. Panchayats shall be made effective judicial instrument;

(o) the curricula in schools, colleges and technical colleges shall be remodeled according to the present demands. The problems created by NCERT curricula shall either be abolished or till the new syllabi is prepared, modified to cultural needs of the people;

(p) to eradicate immorality and vagabondism -- the theology shall be taught again in schools and colleges;

(q) a women university shall be opened;

(r) the living standards of the agriculturist class shall be enhanced and seeds, fertilizers shall be extended to them on subsidy. Revenue cess shall be reviewed and within five

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kilometers of the jungles the timber shall be provided on concessional rates. An allowance for uneducated unemployed shall range from fifty to hundred. Communication facilities shall be provided to all far flung areas of the State and those associated with transport shall be duly appreciated and the fares shall be rationalized. Women shall have separate reserved seats available in all vehicular traffic. Fruit growers shall have facilities of transport to carry their fruit to distant markets in India;

(s) laws shall be framed so that the workers in industries get the facilities and due remuneration for their work. Diligent workers and craftsmen shall receive encouragement through awards and rewards in cash and certificates. Industries shall be encouraged in cooperative sector;

(t) protection of forests and fruit industry is also promised.

The Peoples Conference contested in the general election of 1983 but failed to win the seats either in State legislature or in Parliament except one seat by the Chairman himself who was elected from Karnah constituency.

The only political party, which did not contest the elections of 1983 to the State legislature, is the all J&K People's League. However, the Jamiat-i-Tulba, as a miltant wing of the Jamat-e-Islami also boycotted the elections. The parties, Janata and Bhartiya Janata in Jammu and CPI(M) in Kashmir could secure no seats. The latter put its Secretary in contest but was defeated. The Peoples League had in a Press statement before 1983 elections asserted that they neither accepted accession of the State to India irrevocable nor they treated elections above fraud and coercion. The Peoples League originated from the activists who associated with the well known Alfateh militant organization. It stands for freedom from what they call Indian colonialism. It demands rights to plebiscite as promised by India, Pakistan under the U.N. resolutions. Its claim to plebiscite is unambiguous as

article 4 of its constitution in its explanations clearly indicate the choice in plebiscite for Pakistan. The article declares that the organization shall fight to secure an Islamic welfare State for the people of the State. The only meaning of freedom to the organization is accession to Pakistan. The party has some committed members and cadre throughout the valley yet it is still unknown to common man. Its Chairman, at present is Mr. Mohd. Farooq, a journalist and political activist.

The political party scenario, however changed since October 1989, when the youth in Kashmir took to arms. From 1990 till the elections in 2002, there existed as many as 140 militant groups fighting for what they called as 'Azadi' or independence. Some still persist but mostly known include, Hizbul Mujahideen, Muslim Jaanbaz Force, Al-umar, Hizbullah, Harkatul Mujahideen, Jaish-e-Mohammad, Al-Badar Mujahideen and Lashkar-e-Tayyaba and also Akhwan-ul- Muslimeen. Some of them are based in Indian Kashmir and others in Pakistan administered Kashmir. However, Jammu and Kashmir Liberation Front started as a militant organization and later it played a role that is purely political. It presently has launched a long march from one side of the State to the other known as Safre-Azadi. In terms of political goals they are mostly treated as separatist parties who either want the settlement of Kashmir under the UN resolutions or negotiations amongst parties. However since 1989 AD, the struggle appeared fighting under the two organizational setups. One is purely political and other is exclusively militant. Some of them are inter-related. For example Jamat-e-islamia and Hizbul Mujahideen have coordinated efforts to follow the fight. The militant and political organizations are fighting against India and want either accession to Pakistan or to remain independent of India and Pakistan or to decide the Kashmir dispute in accordance with U.N resolutions. For some time in the past most of the political organizations fighting for Kashmir resolution wanted and strived for amicable settlement of dispute between India and Pakistan. Some times we hear the dialogues being pursued between the two countries successfully, and other time we come to know they have failed. Sometimes, political scenario changes in Pakistan and the other time India is libeled as rigid in her attitude to the talks. Before the elections of 2002 AD, a new main stream political party was initiated under the name of All J&K People's Democratic Party headed by Mufti Sayeed, an erstwhile Congressite. He is patron of the party and his daughter Mehbooba Mufti happens to be its Chairman. The party fought elections in 2002 along with other main stream political parties and won 16 seats in State legislature. None of the main stream political parties could get the majority. Consequential to it a coalition government of PDP and Congress ruled the State till date under an understanding. Mufti Sahib remained Chief Minister of the State from 2002-2005 and at the end of three years the Congress leader Ghulam Nabi Azad functions as the Chief Minister. According to the PDP spokesmen, the party due to militancy filled the vacuum, created due to alienation of the people on account of uncertain situations in the State. The Congress-PDP coalition fell, on 7th July 2008, when Ghulam Nabi Azad lost the confidence of the State Legislature. In the event Governor's rule in J & K was proclaimed. It registers the following subjects for ameliorating the standard of the people:

1. To restore to the State the crumbled institutions.

2. To profound religious tolerance and regional integration

3. To protect the geographical and cultural boundaries of the State and above all to remove confusions about intractability of Kashmir case as well as the crisis.

4. To provide justice to all sections of the society

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5. Fiscal discipline, realistic and visionary planning
6. Revival of tourism
7. Transparency in government business
8. Action against corrupt officials.
9. Accountability in police and security forces including marginalization of SOG
10. Stand against POTA, now abolished
11. Fair distribution of available jobs and rural empowerment through Rahbar-e-taleem.
12. Better deal for labour and coping with power scarcity,
13. Demolition drive and improving civic conditions
14. Economic growth with support and soccor to agriculturists, horticulturists and artisans,
15. Expansion of education in both private and public sector
16. Welfare of women, children and handicapped,
17. Raising of infra-structure including construction of fly over in Srinagar and
18. Equitable distribution and use of State's resources.
19. Calm on borders, much to the relief of border residents and victims of shelling,
20. Increase in pilgrim tourism
21. Hope of return home among distressed pundit migrants, and resolution of Kashmir through dialogue.
22. Reconciliation between India and Pakistan on Kashmir dispute.

All separatist parties namely All Parties Hurriyat Conference, whether headed by Geelani Sahib or Maulana Omar, Awami Action Committee, Kashmir Freedom Movement,

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JKLF, Tehrik-e-Hurriet-e-Kashmir and some more have usually boycotted elections since 1989-90. Presently, both separatist parties and main stream political parties try to achieve amicable settlement of Kashmir either bilaterally or trilaterally negotiations amongst the parties.

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CHAPTER XII

A COMMENTARY

The constitution of J & K, as it exists today, is a constitution by virtue of political expediency and by courtesy of Congress leadership. A brief evaluation of it may prove useful.

The constitution in its very preamble solemnly resolves, in pursuance of the accession of the State of Jammu and Kashmir to India to further define the existing relationship of the Sate with the Union of India. Thus primary object in drafting the constitution is to define the relationship of the State with India. It is unfortunately the fact of history that the constitution possibly would have been different had not the Government of Sheikh Mohammad Abdullah fallen on 9th August 1953. Emphasis on defining the relationship itself is a psychological warfare that existed between the Indian Congress leadership and the N.C leadership from 1952-1974. Bakhshi Ghulam Mohd could not resist the constitutional integration from August 1953-1956, on account of the temptations of power. With regard to the other objectives of the constitution, it may be stated that they remain the same as enshrined in the Indian constitution. In these objectives it is desired to secure for the people what is called social, economic and political justice, and liberty of thought,

expression, belief, faith and worship. Finally it declares to secure to the people of the State the equality of status and of opportunity and to promote fraternity amongst them.

After preliminary in part I of the J&K constitution, the part II of the constitution under section 3 and 5 declare that the State of J&K is and shall be an integral part of the Union of India and provides the jurisdiction of executive and legislative power of the State and the Parliament of India respectively. It provides that the executive and legislative power of the State extends to all matters except for those to which Parliament has power to make laws for the State under the provisions of the constitution of India. These sections in essence render the State constitution of J&K asunder as the Parliament predominates over this State in the same manner and style as in case of the other States in India. Actually, the operative part of the constitution of India is that both in union list as well as in concurrent list the Union predominates. Even in State List the Union can and does prevail over the States. The confrontation with regard to Resettlement Bill between Centre and State of J&K in 1982, is an instance of this nature.

The part III of the J&K constitution relates to the defecation of permanent residents while the sections relating to the permanent residents from section 6 to 10, provide definition of the Indian citizens, it empowers the State legislature to define, alter the definition of the class of persons who are, or shall be permanent residents of the State. Further section 9, empowers the State to confer on permanent residents any special rights or privileges and it has power to regulate or modify any special rights enjoyed by a permanent resident. It also declares under section 6, clause (2) that any person who, before the fourteenth day of May, 1954, was a State subject of class I or of class II and who having migrated after the first day of March 1947, to the territory, now included in Pakistan, returns to the State under permit for resettlement

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in the State or for permanent return issued by or under the authority of any law made by the State. Two important issues arise out of these sections relating to permanent residents. Firstly, only a citizen of India could become the permanent resident -- it means that a person is a permanent resident only by virtue of his being a citizen of India. Secondly, when 'Resettlement Bill' in furtherance of these provisions, was adopted, it became a point of a great controversy on account of its unconstitutionality. The result being that the Bill was referred to Supreme Court for advice. In case the plea of the State Government is annulled the part III of the constitution becomes only a myth. The Supreme Court has not decided the case till date.

The constitution part IV relates to the enunciation of Directive Principles of the State Policy. Incidentally or deliberately these principles are provided in Indian constitution as well and that too in part IV. Further, except certain modifications, in terms of the reference of these principles by and large remain the same. These principles like the principles in Indian constitutions are not enforceable in any court of law -- they are not justiciable. These principles also envisage to establish a socialist order of society for the promotion of welfare of the people. They also promise to develop in a planned manner the productive forces of the country with a view to enrich the national and cultural life of the people. These principles, further, incorporate Gandhian principles as well ,so that village Panchayats and cottage industries are promoted. Compulsory Education, rights of children and women, protection of material, cultural interests of socially and economically backward sections are also safeguarded. Duty of the State to improve public health and to foster equality and secularism is recognized. These principles are provided in Indian constitution and these principles therein laid down are nevertheless fundamental in the governance of the State. However, the principles relating to in-

ternational understanding and cooperation are missing in this part of the constitution— the absence of these principles is well deserved.

In case of the executive under part V of the State constitution, it is stated that the executive power of the State is to be vested in the Governor and is to be exercised by him either directly or through officers subordinate to him in accordance with the constitution. However, in the beginning for couple of years, the Governor was elective office and consequently could hold office during the pleasure of the legislature and later by sixth Amendment Act of 1965, it was converted into an appointee office. Through the Act, Governor was brought at par with any other Governor in any other State of India. As a matter of fact today, the executive in the State has the same position in the State as executive in any other State.

The State legislature is bicameral legislature. Though most states in India have abolished the upper chambers, the State of J & K still retains it. The composition, functions, reservations of seats, qualifications of members, sessions of the legislature, prorogation and dissolution, officer of the legislature, right of Governor to address and sending of messages to the legislature remain the same as provided by the Indian constitution for other states. The conduct of business, voting in the houses, disqualification of members, legislative procedure both in financial and non-financial matters remain the same as provided by the Indian constitution for State legislature for such items. However, minor differences are observable. For example the duration of the State legislature presently is six years. The duration was extended during emergency and latter all states returned back to five years term except the State of J&K.

The State judiciary was separate from the Indian judiciary uptill the signing of Delhi Agreement made on 24th July 1952. The Agreement was fully operative after the arrest of Sheikh Mohammad Abdullah in August 1953, but it had extended the jurisdiction of Supreme Court over the State. One section of Delhi Agreement had declared that the Supreme Court of India shall return the original jurisdiction in respect of disputes mentioned in Article 131 of Indian constitution. Such disputes are those arising between a State and the Government of India. The State Advisory Tribunal was to be abolished and its functions were to pass to the Supreme Court of India. This in effect had made the Supreme Court the final court of appeal in all criminal and civil matters. Later, Amendment Act 1959 (First), read with the constitution of J&K (Ninth Amendment) Act 1967, further brought State judiciary at par with the judiciary of any other State in India under the provisions of the Indian constitution.

In legislative powers as we have discussed in the book at its proper place, Parliament of India has dominance over the States and so has it been retained with the State of J&K. The residuary powers left with the State both by the constitution of India and the Sheikh-Indira Accord of 1975 have no meaning in the federal polity as envisaged by the constitution of India. Dr. M. K. Teng rightly asserts when he says, "It is, however, doubtful, whether a State Government could meaningfully utilize the residuary powers to any advantage within the complex federal relationship the constitution envisages." Further, it may be added that the constitution of India is so elaborate in detailing various subjects under three lists that there remains hardly any residuary power with the State of J&K.

In the administrative and financial relations between the centre and the State of J&K, there is hardly anything left which can be construed to mean an aspect of autonomy. Article 256 of the constitution of India in its application to the State of J&K is appended with a new clause by the constitution (Application of J&K) order, 1954 as:

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"The State of J&K shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the constitution in relation to the State; and in particular, the said State shall, if so required by the union, acquire or requisition property on behalf of and at the expenses of the union, or in default of agreement, as may be determined by arbitrator appointed by the Chief Justice of India."

In addition to the general powers of the Central Government to issue directions to the State Government to ensure compliance with the central laws, the State Government is also subject to the specific obligation to refrain from acts which impede and hamper the executive power of the union.

With regard to financial relations the State is more subservient to the centre than any other relations. The financial relation divides the union sources from State sources. There are some taxes levied and collected by the union but are assigned to the States. Some duties are levied by the union but collected and appropriated by the States. There are taxes which are levied and collected by the union but distributed between the Union and the States. In the scheme of division of powers, the distribution of the revenues is made in favour of all the States uniformly. However, in financial relations the State of J&K is also subject to the paramount power of the union in the same manner as the other Indian States are. No doubt, the State of J&K, reserves with herself residuary powers of taxation. But to be fair it may be said that these residuary powers are so negligible that their existence has never been felt. The Sheikh, during his power complained about the centre for withholding the grant of funds and so does Dr. Farooq Abdullah talk of the niggardly allocation of funds in favour of the State of J&K.

In the constitution as adopted by the Constituent Assembly, sections 138, 139, 140, 141, and 142 related to the State Election Commissioner, who's power of appointment

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was vested in the Sadar-i-Riyasat of the State. Later, by the constitution of J&K (First Amendment) Act, 1959, (Sixth Amendment) Act, 1965 and (Eighth Amendment) Act, 1967, the jurisdiction of Election Commission of India was extended to J&K State. Consequential upon it the State was brought at par with other states of India. Accordingly, the superintendence, direction and control of elections, preparations of electoral rolls for and the conduct of elections to either House of State Legislature and Parliament of India is vested in the election commission of India.

The constitution of J&K provides for a procedure with regard to the amendment of the constitution. Though the procedure is flexible and rigid at the same time, yet in its basic feature the constitution for sections 147, 3, 5 and such of the provisions of the constitutions of India as are applicable in relation to the State of J&K are not only rigid but unamendable. Sections 3, declares that the State of J&K is and shall be an integral part of India and section 5 provides that the executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the constitution of India. Consequently on accepting the predominance of Indian Parliament over the State, legislature of J&K, cannot amend any provision of Indian constitution as are applicable in relation to this State with regard to section 147, the section in itself dealing with the amendment is not amendable by the legislature in any case or event. As a result, finality to the accession on legal basis is guaranteed by the constitution makers.

Thus, the constitution of J&K is not only a miniature Indian constitution, but in letter and spirit it is the same scheme as envisaged by the Indian constitution for the different states which form Indian union. It is accordingly a constitution by virtue of political expediency and by courtesy of the Congress leadership. However, there is one ex-

ception. The constitution for J&K, adopted by the Constituent Assembly, in its initials provided no fundamental rights for the State subjects. Though the Delhi Agreement had already accepted that the Fundamental Rights were to apply to the State of J&K, they were not operative till the constitution (Application to J&K) order, 1954, (C.O. 48 dated 14th May 1954) and came into force on 14th day of May, 1954. These fundamental rights of the Indian constitution are applicable to the State with certain modifications and exceptions. In article 35, the words, "the constitution (Application to J&K) order 1954," was substituted for the words, "This Constitution," and clause (c) there and article 35-A was added. This article 35-A added that notwithstanding anything contained in the constitution, no existing law in force in the State of J&K and no law hereafter enacted by the legislature of the State:-

a) Defining the classes of persons who are, or could be permanent residents of the State of J&K.

b) Conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects

i. employment under the State Government

ii. acquisition of immovable property in the State

iii. settlement in the State ; or

iv. right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is in consistent with or takes any or abridges any rights conferred on the other citizens of India by any provisions of Fundamental Rights. It is in the spirit of these modified Fundamental Rights that the permanent residents feel gratified. Accordingly, no Indian citizen who are not state-subjects can either purchase or sell property in the State of J&K. However, judgments of the Supreme Court of India in various selections in services

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and trainings have proved beyond doubt that the guarantees are rendered ineffective. Further the land provided to non-state subjects under lease is another method by which this concession is eroded.

Ever since the Bakshi regime and the conduct of fair elections, article 370 and the State-Centre relations between Delhi and Srinagar have become symbolic. Every Kashmiri knows its meaning - they consider it a resistance movement against the central hegemony. Even Balraj Puri commenting on it says that the suspicion about the intention of the Government of India regarding gradual merger of the State into the Indian union, expressed by Abdullah, before his arrest in 1953, were gradually confirmed. According to him the merger proposals not only provoked opposition from the followers of the Sheikh but even his successor Bakshi Ghulam Mohammed started resisting them. While Bakshi did not like Government of India to retreat from the subjects enumerated in the instrument of accession, he warned the Democratic National Conference members in the State Assembly that he would not allow them, "to sell Kashmir to India." He also asserted that article 370 would be abrogated on his dead body. Sadiq was installed as the Chief Minister in the State, after the theft of sacred relic but not to anybody's surprise he was not emotional toward article 370. Possibly, his international outlook did not permit him to be locally motivated. However, he was no exception to the local pressure. Mr. Qasim, later, could in no way hazard the abrogation of article 370. Since the elections in 1977, the article 370 in the State politics, has become an emotive issue. It became very symbolic when in election campaign of 1977, the N. C. leader Sheikh Mohammed Abdullah threatened secession of the State from India if there was any move to abrogate the controversial article. According to Balraj Puri, "indiscreet references to its abrogation by some erstwhile Jana Sangh leaders – despite later disclaimers by some senior Janata

leaders – are generally believed to have provoked the electorate in the valley to swing in favour of the Conference so massively." In the elections of 1983, hardly Bhartiya Janata Party, contesting in Jammu province only, stood for the abrogation of article 370. Possibly the party considers it vote catching device as some people in Jammu desire its abrogation. However, most of the party leaders in Jammu, according to Balraj Puri have reconciled to see the continuation of article 370 in the Indian constitution. It is surprising to note in the election manifestos of the Congress, N. C., Peoples Conference and the Jamat-i-Islami that each party promises to defend article 370of the Indian constitution. Even Mrs. Indira Gandhi in her election campaign during May-June 1983 reiterated that her Government has no intentions to abrogate Article 370. Let the Indian national leadership, the local leadership of the Congress (I), National Conference, Peoples Conference, Jamat-i-Islami including any regime in Pakistan play with the sentiments of the people of Kashmir. Time alone shall decide whether India or Pakistan or the people of J&K are victorious in this constitutional battle. However, in the present context, to me it seems that the immediate necessity in the State is nicely described by P.N. Bazaz, a great Kashmiri intellectual, in the folowing words:-

" It is an irony of History that by a combination of fortuitous circumstances a tiny nation of Kashmiris has been placed in a position of great importance where it can be instrumental in making or marring the future of so many. The Kashmiris have to make a truly historic choice. India can help them to make it wisely by trying to understand their feelings, sentiments and aspirations, by allaying their fears and suspicious and, above all, by redeeming the pledges given to them about autonomy as clearly mentioned in the Indian constitution.

"The crises can end in a disaster or a unique triumph depending upon the attitude that is adopted to meet the situation. Led by demagogus, impatient men or self-seekers who make mountains of mole hills, the State may fall apart and cause the disintegration of the Indian republic bringing ruin to Asian democracy in its wake."

"If, on the other hand, better counsels prevail with those who guide public opinion in the three regions (Jammu, Kashmir and Ladakh), there can be no insurmountable obstacle in the way of building a multi-religious and multi-racial democratic State with goodwill and cooperation making allowances for each other's sentiments and respecting the human dignity of all."

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